

**DRAFT TRIBAL CONSULTATION PLAN FOR THE
GLEN CANYON DAM ADAPTIVE MANAGEMENT PROGRAM,
INCLUDING
THE PROGRAMMATIC AGREEMENT ON CULTURAL RESOURCES**

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INTRODUCTION

The Grand Canyon is a place of great religious and cultural importance for the Indian tribes of the region, including the Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Paiute Tribe, Navajo Nation, San Juan Southern Paiute Tribe, Shivwits Paiute Tribe, Southern Paiute Consortium, and Zuni Pueblo. (The Kaibab Paiute Tribe and Shivwits Paiute Tribe participate in this Consultation Plan through the Southern Paiute Consortium.) All of these Tribes possess a wealth of traditional knowledge about the Grand Canyon and the Colorado River, knowledge derived over many generations.

The federal government has a unique relationship with Indian tribes: the federal government supports the right of tribes to exercise self-government and has obligations as a trustee for Indian lands and natural resources. The doctrine of the trust responsibility must be taken into account when federal agencies take actions that affect Indian trust lands and other natural resources, including actions that are subject to generally applicable federal laws, such as the National Environmental Policy Act (NEPA). In addition, tribes have rights under certain federal laws that were enacted to protect historic places and other cultural resources and the graves of their ancestors, including the National Historic Preservation Act (NHPA), Native American Graves Protection and Repatriation Act (NAGPRA), and Archaeological Resources Protection Act (ARPA). These federal laws apply to many places within the corridor of the Colorado River. These federal statutes reflect the public interest in protecting such places, but they also acknowledge that Indian tribes often regard such places as important for reasons different from those of the general public – for Indian tribes, many of the places protected by these statutes are sacred. This is acknowledged by the Bureau of Reclamation in the Final Environmental Impact Statement on the Operation of Glen Canyon Dam (March 1995) (*herein* “Final EIS” of “FEIS”): “The Colorado River, the larger landscape in which it occurs, and the resources it supports are all considered sacred by Native Americans.” Final EIS at p. 141.

In addition to the federal statutes, the reservations of two tribes, the Hualapai Tribe and the Navajo Nation, are bordered by the Colorado River within the Grand Canyon, and the reservation of the Havasupai Tribe is located on a side canyon that can be accessed from the main corridor of the River. The governmental authority of these tribes must be respected by all of the stakeholders in the Glen Canyon Adaptive Management Program (AMP). This means that for activities that occur within reservation boundaries, compliance with the requirements of federal law is not enough – persons who seek to carry out activities within reservation boundaries must also comply with any applicable tribal laws. As such, tribal authority within reservation boundaries is much more than the right to be consulted, but rather the authority to prohibit activities by withholding consent or to regulate such activities by granting permission subject to certain conditions.

1. SCOPE AND PURPOSE OF THE TRIBAL CONSULTATION PLAN

There are multiple reasons for federal agencies to engage in consultation with Indian tribes. This Tribal Consultation Plan (*herein* “Consultation Plan”) seeks to address many of these reasons, especially those based on the National Historic Preservation Act and the Grand Canyon Protection Act.

The Grand Canyon Protection Act (GCPA) requires the Secretary to establish and implement long-term monitoring programs and activities to ensure that Glen Canyon Dam is operated “in such a manner as to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural resources and visitor use.” Grand Canyon Protection Act (GCPA), Pub. L. No. 102-575, title XVIII, §§1802, 1805. The GCPA also expressly requires that research and long-term monitoring programs and activities be established and implemented “in consultation with” Indian tribes, as well as in consultation with the Secretary of Energy; the Governors of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; and “the general public, including representatives of academic and scientific communities, environmental organizations, the recreation industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam.” GCPA §1805(c). While the GCPA thus expressly requires consultation with the Tribes, it does not provide any explicit direction on how such consultation should be conducted, nor on how consultation with the Tribes may need to be different from consultation with the other kinds of persons and entities listed in GCPA section 1805(c). This Consultation Plan explains how consultation with Indian tribes is different from consultation with other stakeholders and provides direction for federal agencies on how to conduct consultation with the specific Tribes that are concerned about the impacts of the operation of Glen Canyon Dam on the natural and cultural resources in Grand Canyon and the Glen Canyon National Recreation Area downstream from the Dam.

The overall purpose of this Consultation Plan is to provide a framework in which the representatives of federal agencies engaged in the Glen Canyon AMP and in the management of cultural and natural resources within the River corridor and the representatives of tribal governments can interact in respectful and constructive ways, so that the rights and governmental status of the tribes are honored and so that the traditional knowledge of the tribes can be brought to bear in the design and implementation of the AMP. The tribes hope and expect that their traditional knowledge, when they choose to offer it, will be treated with the same kind of respect as is the knowledge derived from the efforts of western scientists engaged in the AMP. Although there are some fundamental differences between indigenous and western scientific approaches to the acquisition of knowledge, in light of common concerns for the Grand Canyon, the tribal representatives hope that ways can be found to transcend such differences.

When federal agencies engaged in the AMP propose to conduct activities within the boundaries of a reservation, the consultation requirements of federal law continue to apply, although some of the specific requirements under certain laws are different within

reservation boundaries (as noted later). Within reservation boundaries, however, compliance with federal law is not sufficient. Rather, the tribal government has the authority to grant or withhold permission and to impose requirement under tribal laws. The fact that a person works for a federal agency, or is in the company of federal employees, does not render compliance with tribal law unnecessary. While this Consultation Plan does not explain the requirements for compliance with tribal law in the portions of the River Corridor within the Hualapai and Navajo Reservations, at several points the potential applicability of tribal law is noted.

While the focus of this Consultation Plan is relations between federal and tribal representatives, it may also be useful in guiding relations among the state and non-governmental representatives in the AMP and the tribal representatives.

A. Relationship of this Consultation Plan to the Adaptive Management Program

The Glen Canyon AMP has been established to guide the implementation of the Record of Decision (ROD) on the Final Environmental Impact Statement (FEIS) on the Operation of Glen Canyon Dam. In the ROD, the Secretary of the Interior (Secretary) selected the Modified Low Fluctuating Flow Alternative (identified in the FEIS as the preferred alternative) with certain modifications described in the ROD. Section VI of the ROD, captioned “Environmental Commitments and Monitoring,” lists seven commitments, which are described in more detail in the FEIS. The first commitment is adaptive management. The second commitment is monitoring and protection of cultural resources.

This Consultation Plan establishes processes and rules of relationships that will be followed to ensure continuing government-to-government consultation among the tribes and federal agencies involved in the Glen Canyon Dam AMP. All aspects of the AMP are included in this plan, including but not limited to the Programmatic Agreement on Cultural Resources (PA) and programs for compliance with the Endangered Species Act.

Many entities have roles in carrying out the AMP. The Adaptive Management Work Group (AMWG) is a federal advisory committee, established pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 that operates according to a charter issued by the Secretary. The AMWG includes representatives from concerned federal agencies, state agencies, tribes and non-governmental organizations. Members of the AMWG are appointed by the Secretary; representatives of the Hopi Tribe, Hualapai Tribe, Navajo Nation, Zuni Indian Tribe and Southern Paiute Consortium serve as members of the AMWG. As a federal advisory committee, the AMWG provides recommendations to the Secretary of the Interior’s Designee, who is the federal official that chairs the AMWG and forwards the AMWG’s recommendations to the Secretary for action.

In addition to the Secretary's Designee and the AMWG, other organizational components of the AMP include the Technical Work Group (TWG), Grand Canyon Monitoring and Research Center (GCMRC), independent review panels, and ad hoc workgroups or subcommittees. All work conducted under the auspices of the AMWG must be considered by the AMWG before being incorporated into recommendations to the Secretary.

As a standing workgroup established under the auspices of the AMWG, the TWG has adopted its own operating procedures. Each organization represented in the AMWG is also represented in the TWG, but rather than being appointed by the Secretary each organization names its own representative and may designate an alternate. One Department of the Interior Agency, the U.S. Geological Survey (USGS), is represented on the TWG as a resource for technical advice but does not have a seat at the AMWG.

Meetings of the AMWG and TWG may serve to facilitate government-to-government consultation between federal agencies and tribal governments, but participation in such meetings by federal agency and tribal representatives does not necessarily mean that government-to-government consultation has occurred or that, to the extent such consultation has occurred, it has been adequate. To the extent that consultation does occur in the context of AMWG and/or TWG meetings, it can be, and in many instances should be, supplemented by additional meetings between federal and tribal representatives. Consultations between federal agency officials and tribal officials (or their designated employees with authority to act on their behalf) are not subject to the Federal Advisory Committee Act (FACA) where such meetings are for the purpose of "exchanging views, information, or advice relating to the management or implementation of Federal programs." Unfunded Mandates Reform Act of 1995, 2 U.S.C. §1534.

In addition to the tribes that participate in the AMWG and TWG, the Havasupai Tribe and San Juan Southern Paiute Tribe also have interests that are affected by activities carried out under the auspices of the AMP and/or PA. The fact that these two tribes choose not to participate in the AMWG and TWG does not relieve federal agencies of their obligations to engage in consultation with these tribes.

B. Relationship of this Consultation Plan to the Programmatic Agreement and Historic Preservation Plan

Prior to the completion of the FEIS, a Programmatic Agreement (PA) on Cultural Resources was executed by the Bureau of Reclamation (BOR), Advisory Council on Historic Preservation (ACHP), National Park Service (NPS), Arizona State Historic Preservation Officer (AZ SHPO), and the following tribes: Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Paiute Indian Tribe of Utah, and Zuni Indian Tribe. (Signatures on the PA are dated from August 12, 1993 through August 30, 1994.) This PA was executed to fulfill the responsibilities of BOR and NPS for compliance with Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. §470f, and the implementing regulations issued by the ACHP, 36 C.F.R. part 800. While this PA is included in the FEIS (as Attachment 5), the legal responsibilities under

NHPA section 106 and the ACHP regulations are distinct from the legal responsibilities imposed by the National Environmental Policy Act (NEPA), pursuant to which the FEIS was prepared. BOR is the lead agency for this PA, as the operator of Glen Canyon Dam; as the land managing agency, NPS is responsible for the management of historic properties in Glen Canyon National Recreation Area and Grand Canyon National Park. The PA recognizes that the Hualapai Tribe and Navajo Nation have governmental authority over historic properties within their respective reservations. The AZ SHPO has certain duties pursuant to the ACHP regulations, and as such is a signatory to the PA; the ACHP is a signatory by virtue of its regulatory authority over NHPA section 106. The roles of the AZ SHPO and ACHP in the PA thus distinguish this agreement from the rest of the AMP, since the AZ SHPO and ACHP are not represented in the AMWG.

The PA anticipates the development of a Historic Preservation Plan (HPP) for the long-term management of the Grand Canyon River Corridor District and any other historic properties within the area of potential effects of the Glen Canyon Dam operations. This planned HPP has not yet been developed. This Tribal Consultation Plan is being developed with the intent of incorporating it as an appendix or addendum in the HPP.

The PA is currently being revised to reflect certain developments since it was executed, including Amendments to the NHPA enacted in 1992 and revisions to the ACHP regulations promulgated in December 2000. Pursuant to the 1992 amendments to the NHPA, both the Hualapai Tribe and Navajo Nation have assumed the role in the section 106 process that would otherwise be performed by the AZ SHPO – each has a Tribal Historic Preservation Officer (THPO), and this must be reflected in the revised PA. In addition, the Western Area Power Administration (WAPA) and the Bureau of Indian Affairs (BIA) will become signatories, and additional signatories may also be added.

Although the FEIS refers to the PA as the “Programmatic Agreement on Cultural Resources,” it must be noted that the PA addresses compliance with NHPA section 106 and the ACHP regulations. The PA does not address two other federal cultural resource statutes that are implicated in the effects of the operation of Glen Canyon Dam on the Colorado River Corridor: the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archaeological Resources Protection Act (ARPA). (NAGPRA is not just a “cultural resources” statute – in the legislative history the Senate Committee on Indian affairs described it as “human rights” legislation. The “Consequences” chapter of the FEIS includes NAGPRA under the heading “Indian trust assets.” FEIS, page 318.) Both NAGPRA and ARPA establish legal requirements distinct from NHPA. This Tribal Consultation Plan does include provisions addressing both NAGPRA and ARPA because both statutes mandate consultation between the federal government and Indian tribes.

C. Relationship of this Consultation Plan to Tribal Law

As noted above, activities taken under the auspices of the AMP or PA/HPP are generally subject to tribal law if conducted within reservation boundaries. This

Consultation Plan does not provide detailed guidance on how to comply with tribal law. Through consultation as described in this Consultation Plan, applicable tribal laws can be identified and steps taken to ensure compliance.

2. LEGAL BASICS FOR THE FEDERAL GOVERNMENT’S RELATIONS WITH THE TRIBES

Indian tribes have a special status in American law. As governments that are distinct from the federal government and the states, they are the third kind of sovereign in our federal system. In addition to governmental authority within their reservations, tribes also possess certain kinds of rights that are different from the rights of other Americans, including rights based on treaties and acts of Congress. This section of the Consultation Plan briefly discusses the status of tribes in federal law, with a few references. For further information, the website of the Office of American Indian Trust (OAIT) in the Department of the Interior (DOI) provides references to numerous sources, including DOI policies and documents produced by scholars of the subject matter. See www.doi.gov/oait/legislat.htm. See also Addendum ____.¹

A. Tribal Sovereignty and Trust Responsibility

“The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.” Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” §2(c), 65 Fed. Reg. 67249 (Nov. 6, 2000); *also published at* 25 U.S.C.A. §450 notes.² Federal law recognizes that Indian tribes have inherent sovereignty over their members and their territory. Sovereignty means that tribes have the power to make and enforce laws and to create institutions of government. Saying that tribal sovereignty is inherent means that it comes from within the tribe itself and existed before the founding of the United States. Tribal sovereignty is not absolute, but rather is subject to certain limits established by Congress and the federal courts (although such limits are generally not relevant to this Consultation Plan). In addition to inherent sovereignty, tribes can also exercise governmental authority delegated to them by Congress.

Relations between the federal government and the tribes are shaped by a body of law that includes treaties, acts of Congress, court decisions, and Executive orders. One of the key legal doctrines is known as the federal trust responsibility, which includes fiduciary obligations on the part of the federal government for the management of lands and natural resources held in trust for the benefit of Indian tribes and tribal members. In addition to management of land and other trust resources, Congress has recognized that the trust responsibility “includes the protection of the sovereignty of each tribal government.” 25 U.S.C. §3601. While the Bureau of Indian Affairs (BIA) has the lead role in carrying out the trust responsibility, courts have ruled that other federal agencies also have trust obligations to Indian tribes. The “AMWG FACA Committee Guidance” for the AMP acknowledges this, saying:

“All Federal agencies have a special responsibility to Native Americans by law,

including statutes, treaties, and executive orders. With the Secretary of the Interior being the trustee, Department of the Interior agencies have a special role.” Strategic Plan, Glen Canyon Dam Adaptive Management Program (Final Draft, August 17, 2001) (*herein*, “AMP Strategic Plan”), Appendix B, AMWG FACA Committee Guidance, at Appendix B-7.

As the Final EIS acknowledges, the Navajo Nation and the Hualapai Tribe have management responsibilities associated with Grand Canyon, and that the Navajo Nation also has such responsibilities associated with Glen Canyon. FEIS, page 4. For each of these tribes, its reservation is bordered by the Colorado River, and so these two tribes have governmental authority over lands within the River corridor that are affected by the operation of Glen Canyon Dam. DOI and the Hualapai Tribe do not agree on the precise location of the boundary of the Hualapai Reservation; similarly, DOI and the Navajo Nation do not agree on the location of the boundary of the Navajo Reservation. Neither boundary is the subject of an applicable court ruling.

It is unnecessary to resolve these disagreements prior to the adoption of this Consultation Plan. Accordingly, the Consultation Plan simply notes that there are disagreements regarding these boundaries, and, in parts 7, 8, and 9, this Plan takes note of some of the implications of this boundary issue with respect to the impacts of Glen Canyon Dam operations and activities under the auspices of the AMP and/or PA/HPP on cultural resources and natural resources of importance to the Tribes. If a situation arises that renders it necessary or advisable to definitively resolve an issue relating to a reservation boundary, the protocols in parts 8 and 9 of this Consultation Plan may be used for consultation regarding the resolution of such an issue.

(1) Hualapai Reservation Boundary

The Hualapai Reservation was established by Executive Order on January 4, 1883. This Executive Order places the relevant boundary on the Colorado River for a distance that has since then been determined to be 108 River miles. The Hualapai Tribe maintains that its Reservation boundary is the middle of the Colorado River. The Solicitor’s Office of the Department has issued two opinions, dated February 6, 1976, and November 25, 1997, taking the position that the Reservation boundary is the high water mark on the south bank of the River. These Solicitor’s opinions do not definitively resolve the matter, although these opinions are regarded by officials and staff of Department of the Interior agencies as binding on them. The “high water mark” is the line “to which high water ordinarily reaches and is not the line reached by water in unusual floods.” *Bonelli Cattle Co. v. Arizona*, 495 P.2d 1312, 1314-15 (Ariz. 1972), *reversed on other grounds*, 414 U.S. 313 (1973).

Within the boundary of the Hualapai Reservation, tribal laws apply in addition to federal laws. Under tribal law, it is unlawful for any nonmember of the Tribe to be present within that part of the Reservation except as authorized by the Tribe.

(2) Navajo Nation Boundary Issues

[*Note:* Placeholder for language to be drafted by Navajo Nation, possibly including the point that the Navajo Reservation was established through a Treaty.]

(3) Havasupai Reservation Boundary

[*Note:* Although the Havasupai Reservation boundary is not within the Colorado River corridor, many people gain access to places within the Havasupai Reservation by hiking up from the River Corridor. This would be an appropriate point to insert some language that puts people on notice of this boundary, which was set by a fairly recent Act of Congress.]

B. Government-to-Government Relationship

Because tribes are governments, the relationship between the federal government and the tribes is sometimes described as “government-to-government.” This is recognized in Executive Order 13175, which states, “The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian treaty and other rights.” In the context of the operation of Glen Canyon Dam and the Adaptive Management Program, two of the tribes, the Navajo Nation and Hualapai Tribe, as noted above, have governmental authority over some of the lands and waters in the River corridor. Although the other tribes do not have such governmental authority in the River corridor, they all have rights protected by federal statutes. Tribes are sovereign governments and they must be treated as such even when the matters at issue are beyond the reach of tribal territorial sovereignty. Moreover, tribes and federal agencies may enter into agreements through which tribes assist federal agencies in carrying out their responsibilities. In one sense, the term “government-to-government” relations is a way of reminding people that Indian tribes are different from non-governmental organizations that advocate for the interests of particular groups that comprise part of the general public.

The relationship between tribes and states can also be described as “government-to-government.” State-tribal relations, though, are different from federal-tribal relations. For example, federal-tribal relations are subject to the federal trust responsibility, while the states have no corresponding responsibility to tribes.

3. BACKGROUND ON TRIBAL GOVERNMENT INVOLVEMENT REGARDING THE OPERATION OF GLEN CANYON DAM

A. Tribal Roles in the Environmental Impact Statement (EIS)

In 1991, the Bureau of Reclamation and the Hopi Tribe, Hualapai Tribe, Navajo Nation, Southern Paiute Consortium, and Pueblo of Zuni entered into cooperative agreements to facilitate tribal involvement and input into the Glen Canyon Environmental Studies Program. Tribal involvement focused on identification of historic

properties and resources of tribal concern necessary for incorporation into the *Operation of Glen Canyon Dam Final Environmental Impact Statement (FEIS)*.

In 1992, the Bureau of Reclamation recognized that making a decision on the operation of Glen Canyon Dam based on the FEIS would constitute an undertaking as defined by Section 106 of the National Historic Preservation Act. Section 106 of NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties (i.e., properties eligible for or listed on the National Register of Historic Places) and to afford the Advisory Council on Historic Preservation an opportunity to comment on such undertakings. Section 106 also requires consultation with Indian tribes and other interested parties that might have concerns with the effects of the undertaking (in this case the operation of Glen Canyon Dam) on historic properties.

B. Tribal Roles in the Programmatic Agreement (PA)

The Tribes participated in the Section 106 process with respect to identification and evaluation of historic properties that lie within the area of potential effects of Glen Canyon Dam operation. By August of 1994, the Advisory Council on Historic Preservation, the Bureau of Reclamation, the Arizona State Historic Preservation Officer, the National Park Service, the Hopi Tribe, Hualapai Tribe, Kaibab Paiute Tribe, Navajo Nation, Paiute Indian Tribe of Utah for the Shivwits Paiute Tribe, and the Pueblo of Zuni signed a Programmatic Agreement on Cultural Resources (PA). The PA stipulates completion of identification and evaluation of historic properties affected by dam operations; development of an interim plan for monitoring effects of dam operations on eligible properties and performing remedial actions to address effects of ongoing damage to historic properties; and incorporation of results of identification, evaluation, monitoring and remedial actions into a Historic Preservation Plan for the long-term management of historic properties within the area of potential effects of dam operations, an area defined by the maximum possible discharge from the dam, 256,000 cubic feet per second flow.

From the signing of the PA through October 1997 when a Record of Decision was signed by the Secretary of the Interior, the Tribes continued to identify resources and to determine where and how dam operations were likely to adversely affect those resources. Resources of tribal concern included historic properties as defined by NHPA, places where Native American graves and/or other cultural items covered by NAGPRA are located, as well as sacred sites as defined by Executive Order 13007, and natural resources not specifically covered by particular laws, regulations, or Executive orders. These categories of resources may overlap. Historic properties as defined by NHPA mean properties that are listed on or eligible for the National Register of Historic Places. Places where Native American graves are discovered may be determined eligible for the National Register. Many sacred sites as defined in Executive Order 13007 may be eligible for the National Register, but the concerned Tribe(s) may choose not to have such sites documented for purposes of eligibility determinations; in some cases, the concerned Tribe(s) may not object to such documentation, but for various reasons such documentation may not have been prepared yet. Similarly, places where there are natural

resources that do not appear to be protected by specific laws, regulations or Executive orders may be eligible for the National Register as traditional cultural properties, but documentation needed for eligibility determinations may be lacking.

C. Tribal Interests Reflected in the Final EIS

The Final EIS addresses the concerns of the Tribes in two sections on cultural resources (one in Chapter III Affected Environment, pp. 140-146, and one in Chapter IV Environmental Consequences, pp. 260-271) and in a section on Indian trust assets (in Chapter IV Environmental Consequences, pp. 318-319). For the most part, the discussion of tribal interests in the EIS focuses on cultural resources, although the section on tribal trust assets does acknowledge that Native American human remains and cultural items are protected by NAGPRA, which recognizes that the tribe that is culturally affiliated with such items located on federal lands has rights of “ownership or control.”

The Final EIS uses two basic categories to classify “cultural resources”: “archaeological sites” and “Native American traditional cultural properties and resources,” recognizing that there is some overlap between these categories. Final EIS, pp. 260-261. In addition to these two categories, the Final EIS also mentions “isolated occurrences,” which are described in the Final EIS as “findings of artifacts or other remains located apart from an archaeological site.” The 489 “isolated occurrences” noted in the Final EIS were not evaluated for eligibility for the National Register of Historic Places and were not considered in the impact analysis in the EIS.

The Final EIS states that 475 archaeological sites have been documented in the Colorado River corridor between Glen Canyon Dam and Separation Canyon. Of these, 323 sites have been determined eligible for the National Register of Historic Places as contributing elements to the Grand Canyon River Corridor Historic District. The remaining sites were either considered not eligible for the National Register, or were not evaluated because they are outside the zone of impact. Most of these sites represent prehistoric and historic use by Indian people. (Some 71 sites, or components of sites, represent historic use by Anglo-Americans.) In addition, the final EIS notes that, including the areas outside of the River Corridor, over the years more than 2,600 sites have been documented in Grand Canyon and more than 2,300 sites have been documented in Glen Canyon.

In addition to “archaeological sites,” the Final EIS discusses the category of “traditional cultural properties and resources.” Traditional cultural properties (TCPs) are places that are eligible for the National Register if they are affiliated with a living community, such as an Indian tribe, and “are rooted in the living community’s history and important in maintaining the community’s cultural identity.” Final EIS, p. 261, *citing* NATIONAL REGISTER BULLETIN NO. 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES. (Bulletin 38 is available on the internet at www.cr.nps.gov/nr/publications/bulletins/nr38_toc.htm.) Places may be considered TCPs regardless of whether they contain archaeological remains. As stated in the Final EIS:

“The Colorado River, its tributaries, the canyons through which it flows, the canyon rims, and the mountains and plateaus that surround them form a sacred landscape that is culturally significant to the Indian Tribes with ties to the Grand Canyon. Within this landscape are specific places, ranging from archaeological sites to mineral collection areas, considered important for a variety of reasons by each tribe. The locations of these traditional cultural properties are sometimes closely held secrets, and it is often with reluctance that tribes reveal specific sites.”

The Final EIS also says, “Virtually all prehistoric sites are affiliated with contemporary Indian tribes, often more than one group due to multiple traditions or multiple uses of many sites found along the Colorado River.” Final EIS, p. 261. “Traditional cultural properties can include specific plant gathering areas, landforms, springs, prayer offering locations (shrines), archaeological sites, ancestral burials, mineral deposits, and other resource collection sites.” Final EIS, p. 261. Some kinds of resources can be obtained at many different locations. With regard to these “traditional resources,” the Final EIS says that:

“because they are not place-specific or because they encompass large areas as cultural landscapes, [they] are not eligible for the National Register. Their importance to Native Americans, however, is not lessened because of the way current cultural preservation law is defined. In addition, many of them are governed by the National Park Service (NPS) management policies that require all cultural landscapes to be treated as cultural resources, regardless of the type or level of significance.” Final EIS, p. 261.

The information in the Final EIS regarding TCPs is less specific than for archaeological sites, for a variety of reasons, including the reluctance of the Tribes to reveal sensitive information about TCPs and the difficulties inherent in defining boundaries for specific TCPs within a landscape that the Tribes regard as a single TCP from rim to rim. Moreover, as the Final EIS notes, the evaluation of “isolated occurrences” within the River Corridor by the Tribes is ongoing. Final EIS, p. 261.

D. Tribal Roles in the Adaptive Management Program

In 1997, the Adaptive Management Work Group or AMWG was chartered to provide advice and recommendations to the Secretary of the Interior relative to Glen Canyon dam operations. According to the AMWG Charter, members of the AMWG are appointed by the Secretary of the Interior and include one representative from the Hopi Tribe, Hualapai Tribe, Navajo Nation, San Juan Southern Paiute, Southern Paiute Consortium, and Pueblo of Zuni. Tribal members are appointed based on input and recommendations from the respective tribal governments. The first official meeting of the AMWG was held on September 10-11, 1997, and meetings have been held twice or more per year ever since.

From 1997 through 1999, the participation of the Tribes in the meetings of the AMWG and in the overall Adaptive Management Program (including the Programmatic Agreement (PA) on cultural resources) was funded through a cooperative agreement with the Grand Canyon Monitoring and Research Center (GCMRC). The objectives specified by these agreements were to have the Tribes assist in the monitoring and research necessary to assess impacts or effects of the Secretary's actions in the operation of Glen Canyon Dam on resources of tribal concern.

In 1999, the cooperative agreements with the GCMRC were terminated and new agreements were issued between the Tribes and the Bureau of Reclamation. The purpose of this change in administration of the agreements was to more formally recognize the continuing government-to-government relationship and communication over Reclamation's operation of Glen Canyon Dam. Reclamation's administration of the agreements was designed to ensure the Tribes have a continuing voice in dam operations and in any planning or actions necessary to minimize harm to resources of concern to the Tribes that are affected by dam operations. These agreements remain in place today.

E. Tribal Commentaries on Experiences with Consultation

In the context of the AMP, while the tribes are represented in the AMWG and TWG, tribal representatives are less than completely satisfied with their involvement in either group. Tribal representatives have the impression that both groups are driven by the interests of western science and that tribal concerns grounded in tribal religious and cultural beliefs are not afforded appropriate respect, consideration, and appreciation. The tribes tend to understand cultural resources as a broad concept that includes not only the physical remains of past human activity but also the living things and places that have ongoing cultural importance, while other participants in the AMP seem to regard cultural resources as a narrower concept. Tribal representatives also have the impression that some of the other participants in the AMWG and TWG convey a lack of understanding of the status of tribes as sovereign governments. In addition, when tribal representatives do voice their concerns in the AMWG and TWG meetings, and otherwise provide input for the AMP, the tribes are not routinely informed regarding how their input was considered and, if tribal recommendations are not accepted the reasoning for such decisions. Consequently, although tribal representatives have participated in the AMWG and TWG, they generally do not regard their participation as "consultation."

In the context of the PA, consultation between tribes and the federal agencies has occurred. The federal officials engaged in this consultation have specific responsibilities for carrying out the federal cultural resources statutes, and they are aware of their obligations to consult with the Tribes. Tribal representatives, however, generally believe there is a need to improve the quality and effectiveness of this consultation because, from their perspectives, even if they do reach agreement on certain issues during consultation meetings, the federal agencies sometimes do not abide by the agreements reached.

4. DEFINITION OF “CONSULTATION” FOR THIS PLAN

There is no standard definition of “consultation,” although it generally does mean more than simply providing information about what an agency is planning to do and allowing concerned people to comment. Rather, “consultation” generally means that there must be two-way communication. In the context of the PA and AMP, much of the consultation with tribes concerns places and resources that qualify for treatment as historic properties under NHPA, and so it appears appropriate to quote the definition of “consultation” from the guidelines issued by the National Park Service for federal agencies in carrying out historic preservation programs, a definition that is also incorporated into the regulations of the Advisory Council on Historic Preservation for the NHPA Section 106 consultation process:

“Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.”

63 Fed. Reg. 20504 (Apr. 24, 1998).

This general meaning of “consultation” is subject to specific requirements established pursuant to legal authorities that apply in certain circumstances. Requirements of the three major federal cultural resources statutes are discussed later in this Consultation Plan. See Part 7.

While consultation means more than simply providing information, it does not mean that the parties being consulted have the power to stop a federal agency action by withholding consent. As the AMWG FACA Guidance notes (with specific reference to consultation under NHPA), “the ultimate decision on how to proceed rests with the Secretary of the Interior and the federal agencies delegated the responsibility for management of the resources.” AMP Strategic Plan, at Appendix B-8.

In some instances another federal agency or a non-federal entity may have the legal authority to stop a proposed action. (For example, in the context of the AMP and PA/HPP there may be instances in which the consent of either the Navajo Nation or the Hualapai Tribe is legally required for a federal action to proceed, that is, if the action would occur within the boundaries of either Tribe’s reservation. In such cases, the requirement for tribal consent is distinct from requirements to engage in consultation.)

In cases in which consultation does not lead to an agreement, it may end when it becomes clear that an agreement will not be reached. In some situations, even though a tribe does not have legal authority to prevent an agency from going forward with a proposed action, consultation may nevertheless persuade the agency official to decide not to proceed, perhaps because to do so would jeopardize the ongoing consultative relationship between the agency and the tribe. In any matter in which a tribe has made recommendations and the federal agency decision-maker has not accepted the tribe’s

recommendations, the agency shall advise the tribe that its recommendations have not been accepted and provide reasons for rejecting such recommendations.³

5. GOALS AND EXPECTATIONS OF CONSULTATION.

The federal agencies involved in the AMP and PA/HPP are well aware of the cultural and religious importance to the concerned Tribes of historic and cultural resources within the River corridor, and the Tribes rightfully expect that their concerns will be taken seriously by these agencies.

A. Adaptive Management Program

The Tribes expect that the agencies and organizations that are represented on the AMWG and TWG will interact with tribal representatives in ways that reflect awareness of the governmental status of tribes and that demonstrate respect for traditional tribal knowledge and religious beliefs. The Tribes expect that other agencies and organizations engaged in the AMWG and TWG will seek and consider tribal input on the entire range of issues, not just cultural resources. With respect to cultural resources, the Tribes expect that federal agency activities affecting these resources will be carried out in accordance with the PA and HPP. The Tribes also expect that other agencies and organizations will keep in mind that many sites at which cultural resources are located have not been documented as such. In addition, the Tribes regard the term “cultural resources” as including a broad range of places and things, often including biological communities and geological features that have cultural and/or religious significance, regardless of whether physical manifestations of human activity are present at a place. Such places may be eligible for the National Register of Historic Places as traditional cultural properties; regardless of National Register eligibility, such places may be Sacred Sites subject to accommodation of tribal religious practices under Executive Order 13007.

B. Programmatic Agreement and Historic Preservation Plan

The Tribes expect that federal agency activities affecting cultural resources within Grand Canyon National Park, Glen Canyon National Recreation Area, the Hualapai Reservation and the Navajo Reservation will be conducted in accordance with the Programmatic Agreement (PA) and Historic Preservation Plan (HPP). To the extent that specific cultural resources issues are not addressed in the PA and/or HPP, the Tribes expect that all parties will comply with applicable federal and tribal laws and will engage in meaningful consultation with concerned Tribes, as provided in this Consultation Plan, before taking any action that will affect cultural resources. In that the ACHP and AZ SHPO are parties to the PA but are not represented in the AMP, the Tribes expect that the ACHP and AZ SHPO will monitor the activities conducted under the auspices of the AMP to ensure that the commitments made in the PA and HPP are fulfilled.⁴

6. PRINCIPLES FOR CONSULTATION WITH TRIBES

The following general principles can be used to guide consultation in a variety of contexts.⁵ The specific requirements noted in Part 7 also apply to certain kinds of matters, in addition to these general principles.

A. Know the Tribes

As a prerequisite for effective consultation, the representatives of each of the federal agencies engaged in the AMP and/or the PA and HPP must have a basic level of understanding about the concerned tribes. Knowledge about the tribes will also promote more constructive communication among tribes and non-federal entities. Addendum ____ to this Consultation Plan [not yet drafted] provides some basic information regarding each of the Tribes, such as contact information for representatives to serve as points of contact for consultation under this plan.⁶

Consultation will generally be more effective if tribal representatives have a clear understanding of each federal agency's mission and programs. Federal representatives should ensure that tribal representatives have relevant information about their agencies. Tribal representatives should have a working knowledge about each federal agency and should not hesitate to ask federal representatives for explanatory information when needed.

B. Know the Legal Requirements

Another prerequisite to effective consultation, especially in the context of cultural resources, is that federal agency representatives know the legal requirements that may apply. While these requirements are summarized in Part 7 of this Consultation Plan, to develop a working knowledge of these requirements generally requires participation in training programs.

C. Build On-Going Consultative Relationships with the Tribes.

Consultation on specific matters will tend to be more constructive if conducted within the framework of an ongoing government-to-government relationship. Consultation puts demands on tribes as well as on agencies, and such relationships can help tribes and agencies decide how to most effectively allocate their resources among the specific matters for which consultation may be appropriate. Accordingly, this Consultation Plan establishes a framework for ongoing consultation.

D. Institutionalize Consultation and Collaboration Procedures

Consultation is more effective when there are established protocols for the specific kinds of contexts in which consultation may occur. This Consultation Plan sets out these protocols in Parts 8 and 9.

E. Contact Tribes Early and Allow Sufficient Time for Consultation

As a general rule, agencies should contact tribes as soon as there is enough information so that consultation will be constructive and so that changes to a proposed agency action can be more easily accommodated based on tribal concerns. The protocols specified in Parts 8 and 9 provide some guidance for specific contexts.

F. Establish Training Programs for All Agency Staff on Consultation with Tribes

Consultation will be more constructive if agency staff have participated in appropriate training programs. Tribal representatives are not responsible for educating agency personnel on their responsibilities in consultation.

G. Maintain Honesty and Integrity

Honesty and integrity are essential. If agency representatives cannot respond immediately to tribal concerns, they must acknowledge such concerns and ensure that they are addressed at a future date. When tribal recommendations are not accepted, agencies must inform tribal representatives and provide reasons for not accepting tribal recommendations.

H. View Consultation as Integral

A federal agency should see relations with tribal governments as an integral part of its mission, with an understanding that consultation is essential to maintaining constructive relations with tribal governments, and not just as a procedural requirement. By regarding consultation as integral, agencies can use consultation as a non-adversarial opportunity to develop consensus solutions or otherwise find common ground.

7. LEGAL REQUIREMENTS FOR CERTAIN KINDS OF CONSULTATION

As noted in Part 1 of this Consultation Plan, the Grand Canyon Protection Act (GCPA) requires the Secretary to establish and implement long-term monitoring programs and activities to ensure that Glen Canyon Dam is operated “in such a manner as to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural resources and visitor use.” The GCPA also expressly requires that long-term monitoring programs and activities be established and implemented “in consultation with” Indian tribes, as well as in consultation with others. GCPA §1805(c). The GCPA does not provide explicit direction on how consultation with the Tribes should be conducted.

The Record of Decision (ROD) for the operation of Glen Canyon Dam, which was based on the FEIS, includes a number of environmental and monitoring commitments. The regulations of the Council on Environmental Quality (CEQ)

implementing the National Environmental Policy Act (NEPA) require the implementation of these commitments, since they are part of the ROD. See 40 C.F.R. §1505.3. Commitment number 2 in the ROD, captioned “Monitoring and Protection of Cultural Resources,” provides, in part, “Reclamation and the National Park Service, in consultation with Native American Tribes, will develop and implement a long-term monitoring program for these sites [i.e., ‘prehistoric and historic sites and Native American traditional use and sacred sites.’]. Any necessary mitigation will be carried out according to a programmatic agreement written in compliance with the National Historic Preservation Act.” The ROD itself does not specify how this consultation will be carried out. One of the key documents prepared for carrying out the commitments in the ROD, the “Final Draft Information Needs” document for the AMWG and TWG (Dec. 14, 2001), explicitly provides for consultation in Management Objective 11.3, which says:

Protect and maintain physical access to traditional cultural resources through meaningful consultation on AMP activities that might restrict or block physical access by Native American religious and traditional practitioners.

Moreover, Management Objectives 11.1 and 11.2 specify a number of information needs that implicitly require consultation with the Tribes (since meeting these information needs generally requires consultation with the Tribes). The Information Needs document does not specify how consultation will be accomplished.

There are several federal statutes, however, that do establish explicit requirements for consultation with tribes, in some cases through statutory language and in some cases through implementing regulations. NEPA is triggered by federal agency action, and the CEQ implementing regulations require agencies to invite tribes to become involved. Both NHPA and NAGPRA establish consultation requirements. ARPA establishes a requirement to provide notice to tribes. The regulations implementing the National Environmental Policy Act (NEPA) include requirements to seek involvement of Indian tribes. Secretarial Order No. 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997), sets out certain requirements for consultation with tribes in the implementation of the Endangered Species Act (ESA). The order of presentation in this Part of the Consultation Plan does not indicate anything about the relative importance of these legal requirements. Rather the order of the federal requirements is generally from the most inclusive to the most specific.

In addition, within the Navajo and Hualapai Reservations, the respective tribal governments have legal authority as an aspect of inherent tribal sovereignty, and tribal laws also apply. Requirements under tribal law are briefly noted after the discussion of federal requirements.

A. NEPA Consultation

NEPA, 42 U.S.C. §§4321 – 4370d, requires the preparation of an environmental impact statement (EIS) for any proposed federal action that would significantly affect the quality of the human environment. This requirement is implemented through regulations issued by the President’s Council on Environmental Quality (CEQ). 40 C.F.R. parts 1500 – 1508. The EIS on the Operation of Glen Canyon Dam was prepared pursuant to NEPA and the CEQ regulations. When an EIS is prepared, the CEQ regulations include provisions requiring the lead federal agency to invite affected Indian tribes to become involved in the EIS process at several points, including: scoping, §1501.7; providing notice of public hearings, meetings and the availability of NEPA documents, §1506.6(b)(3); and commenting on a draft EIS, §1503.1(a)(2). In addition, a tribe may become a cooperating agency for the preparation of an EIS, §§1501.6, 1508.5. As noted earlier, cooperating agencies in the preparation of the EIS on the Operation of Glen Canyon Dam included the Hopi Tribe, Hualapai Tribe, Navajo Nation, San Juan Southern Paiute Tribe, Southern Paiute Consortium, and Zuni Pueblo.

Under the CEQ regulations, a federal agency can prepare a less detailed NEPA document known as an environmental assessment (EA) in order to determine whether an EIS is required. The key question an EA seeks to answer is whether the impacts of a proposed action will be “significant.” If so, an EIS is required; if not, then the responsible federal official signs a “finding of no significant impact” (FONSI). In addition to the decision whether to prepare an EIS, an EA may also be used to identify mitigation measures so that adverse environmental impacts may be avoided or the intensity of such impacts reduced. The CEQ regulations provide very little guidance on the preparation of an EA; as such, the basic legal requirements to seek involvement of tribes regarding EAs is the section requiring notice of hearings, meetings and the availability of NEPA documents. §1506.6(b) (3). An EA is often used, however, to help identify other legal review and consultation requirements that may apply to a proposed federal action, and several of these other requirements do have explicit requirements to consult with tribes. Accordingly, it is generally advisable for federal agencies preparing EAs on proposed actions seek involvement by tribes that may be concerned regarding the possible impacts of a proposed action.

Federal actions that are treated as categorical exclusions for purposes of the NEPA process may nevertheless have impacts on places and resources that are important to the tribes. The use of categorical exclusions will be subject to discussions among federal agencies and tribes in consultation meetings specified in the protocols in part 8, if a tribe or federal agency chooses to put this topic on the agenda for such a meeting.

B. NHPA Consultation.

Pursuant to NHPA section 106, consultation is triggered by a proposal for a federal or federally-assisted undertaking that may affect properties that are listed on or eligible for the National Register of Historic Places. 16 U.S.C. §470f. Under the regulations issued by the Advisory Council on Historic Preservation (ACHP), 36 C.F.R. part 800, the federal agency with authority over the undertaking has a lead role in carrying out the process, along with the state historic preservation officer (SHPO) or the

tribal historic preservation officer (THPO) if the undertaking occurs within the boundaries of a reservation and the tribe has taken over the duties of an SHPO as authorized by section 101(d) of the statute. For undertakings that would affect properties within the boundaries of the Navajo Reservation or the Hualapai Reservation, both the Navajo Nation and the Hualapai Tribe have assumed the THPO role. The ACHP generally does not become involved in the review of specific undertakings, but retains the authority to do so.

If a tribe attaches religious and cultural importance to a historic property, then the tribe has a statutory right to be a consulting party, regardless of the ownership status of the land on which the potentially affected historic property is located. 16 U.S.C. §470a (d) (6). This statutory requirement to consult with tribes was enacted in the NHPA Amendments of 1992. The standard process through which such consultation takes place is set out in the ACHP regulations. 36 C.F.R. part 800. The ACHP regulations were issued in revised final form in December 2000, to implement the 1992 NHPA Amendments. (The revised regulations had not yet been issued when the EIS was prepared on Glen Canyon Dam operations.) The revised regulations include numerous provisions to ensure that Federal agencies make reasonable and good faith efforts to engage tribes in section 106 consultation, including: identifying participants in the section 106 process, §800.2(c)(2); initiation of the section 106 process, §800.3(c) (identification of the appropriate SHPO/THPO); §800.3(d) (consultation on tribal lands); identification of historic properties, §800.4 (numerous provisions); assessment of adverse effects, §800.5(a), (c)(2)(ii) (participation as THPOs and as tribes with concerns regarding off-reservation places); resolution of adverse effects, §800.6 (participation as THPOs and as consulting parties); coordination with NEPA, §800.6 (several specific requirements for involvement of tribes); federal agency program alternatives, §800.14(b) (consultation with tribes when developing programmatic agreements). In addition, the presence of issues of concern to Indian tribes is one of the criteria that the Advisory Council on Historic Preservation will consider in deciding whether to become directly involved in the section 106 process for a particular proposed action. Appendix A to Part 800.

The standard process may be modified through the adoption of a programmatic agreement (PA), as was done in the decision based on the Final EIS for the operation of Glen Canyon Dam. In light of the extensive changes in the ACHP regulations since the PA was signed, as well as in recognition of developments in the implementation of the AMP, the signatories to the PA recognize the need to develop an updated, revised PA.

Issues previously noted regarding the location of the boundaries of the Hualapai and Navajo Reservations have implications for NHPA consultation regarding proposed federal undertakings on lands where the location of the reservation boundary is subject to disagreement. Briefly, since both the Hualapai Tribe and Navajo Nation have approved THPO programs, the role of the Arizona SHPO in the section 106 process for federal undertakings within reservation boundaries is limited. As prescribed in the ACHP regulations, the federal agency “shall consult with the THPO in lieu of the SHPO

regarding undertakings occurring on or affecting historic properties on tribal lands.” 36 C.F.R. §§800.2(c) (2) (i) (A), 800.3(c) (1).

If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO “shall participate as a consulting party if the undertaking occurs on tribal lands but affects historic properties off tribal lands, if requested in accordance with §800.3(c)(1) [pursuant to which the owners of land within a reservation not held in trust for the tribe or owned by a tribal member can ask the SHPO to participate in the section 106 process], or if the Indian tribe agrees to include the SHPO pursuant to §800.3(f) (3).[36 C.F.R. §800.2(c) (1) (ii) (reformatted)].

If a tribe other than the tribe within whose lands a historic property is located attached religious and cultural significance to such a property, the federal agency has a legal obligation to consult with the tribe for who the property holds religious and cultural significance, “regardless of the location of the historic property.” 36 C.F.R. §§800.2(c) (2) (ii), 800.3(f) (2). Accordingly, disagreements over the location of the reservation boundaries do not affect the right of a tribe that attaches religious and cultural importance to a historic property to be a consulting party. Such disagreements, however, may affect the role of the SHPO. This issue is addressed in the protocols in part 9 of this Consultation Plan.

In addition to the specific procedural requirements of NHPA and the implementing regulations issued by the Advisory Council, Federal agency actions should also abide by the policy statement set forth in the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. §1996, and by Executive Order 13007, Indian Sacred Sites (May 24, 1996), published at 61 Fed. Reg. 26771; also published at 42 U.S.C.A. §1996 notes.

C. NAGPRA Consultation.

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§3001-3013, 18 U.S.C. § 1170, has been described as human rights legislation. NAGPRA recognizes that Native Americans (including Native Hawaiians) regard the physical remains of their ancestors, funerary offerings and other kinds of cultural items as holding great religious significance. NAGPRA includes provisions for the repatriation of human remains and other cultural items from museums and federal agencies to tribes, and for the protection of Native American human remains and other cultural items located on (or embedded within) federal lands and tribal lands. This Consultation Plan addresses the graves protection provisions of NAGPRA, rather than the repatriation provisions. The graves protection provisions of NAGPRA apply to Native American Native American human remains and other “cultural items”-located on federal lands and within the boundaries of Indian reservations. 25 U.S.C. §3002. For purposes of NAGPRA, the term “cultural items” includes funerary objects, sacred objects, and objects of cultural patrimony. The statutory requirements are implemented through regulations issued by the National Park Service (NPS). 43 C.F.R. part 10.

It is important for all agencies and organizations to understand that Native American human remains and cultural items covered by NAGPRA hold religious significance for the tribes. With respect to human remains and cultural items that are excavated or removed from federal lands, NAGPRA recognizes the rights of tribes with cultural affiliation to human remains and cultural items to take custody of these items. For human remains and cultural items excavated or removed from “tribal lands” (i.e., lands within reservation boundaries), NAGPRA recognizes rights of ownership or control in the tribe “on whose lands such objects or remains were discovered.” 25 U.S.C. §3002.

NAGPRA’s graves protection provisions apply in two different contexts: intentional excavations and inadvertent discoveries. 43 C.F.R. §§10.3, 10.4. In the event of an inadvertent discovery, the regulations require immediate notification, in the case of federal lands, to the federal land manager (in this case the National Park Service), or, in the case of tribal lands, to the responsible tribal official. The regulations also require the cessation of the activity that resulted in the inadvertent discovery.

For discoveries on *federal lands*, the federal land manager must notify all the Indian tribes that are likely to be culturally affiliated with the remains or other cultural items. If, as a result of an inadvertent discovery on federal lands, a decision is made to remove the human remains and/or cultural items from the ground, the removal is treated as intentional excavation. 43 C.F.R. §10.4(d) (v). Intentional excavation requires a permit issued pursuant to the Archaeological Resources Protection Act (ARPA). In the case of either an inadvertent discovery or intentional excavation, NAGPRA requires consultation with tribes that are likely to be culturally affiliated with the human remains and/or cultural items. 43 C.F.R. §10.5. If the items must be removed from the ground, then NAGPRA provides a system for determining who has rights of ownership or custodial control over the human remains or cultural items. Briefly, in the case of human remains and associated funerary objects, the lineal descendants, if known, have the highest priority right of ownership or control. For items found on federal lands, where there are no known lineal descendants, the tribe with the strongest claim of cultural affiliation has the right of ownership or control. *See* 43 C.F.R. §10.6.

For human remains and cultural items excavated or removed from *tribal lands*, the right of custody is different from that for federal lands. Known lineal descendants have the highest priority right for human remains and associated funerary objects (as they do on federal lands). If there are no known lineal descendants, and for other kinds of cultural items covered by NAGPRA, the tribe with ownership or jurisdiction over the lands has the right of ownership or control. Such a tribe could consider a request from another tribe asserting a stronger claim of cultural affiliation, but the tribe on whose tribal lands the human remains or cultural items were found has no legal obligation to do so. In addition, such items can only be lawfully removed from the ground pursuant to a permit issued under ARPA (or by the tribe itself, which is exempt from the ARPA permit requirement, or by a tribal member pursuant to tribal law), and such a permit can only be issued if the tribe with jurisdiction over the tribal lands give its consent. 25 U.S.C. §3002(c) (2).

Accordingly, issues previously noted regarding the location of the boundaries of the Hualapai and Navajo Reservations have implications for the application of NAGPRA in the event of a discovery of human remains and/or cultural items on lands where the location of the reservation boundary is in dispute. With respect to the Hualapai Reservation, the likelihood of inadvertent discoveries in area subject to disagreement may be relatively slight, given that the lands subject to disagreement are below the high water line and, as such, have historically been subject to erosion by the River. With respect to the Navajo Reservation, the implications of this disagreement affect a larger amount of land. The protocols in part 9 acknowledge that a situation may arise in which the resolution of the boundary issue may be necessary.

The NAGPRA regulations encourage federal land managing agencies to enter into “comprehensive agreements” with tribes that are affiliated with human remains and/or cultural items that are likely to be discovered on or excavated from federal lands. 43 C.F.R. §10.5(f). Such agreements can address all federal agency land management activities that could result in inadvertent discoveries or intentional excavations. Such an agreement does not exist, and this Consultation Plan does not constitute such an agreement. In conjunction with carrying out this Consultation Plan, the tribes and NPS may determine that it would be desirable to develop such a comprehensive agreement.

D. ARPA Consultation

The Archaeological Resources Protection Act (ARPA) applies to “archaeological resources” located on federal lands and “Indian lands” (held in trust or subject to federal restrictions). 16 U.S.C. §§470aa – 470mm; regulations at 43 C.F.R. part 7. ARPA imposes criminal and civil penalties for removing, excavating, damaging or destroying such “archaeological resources,” a term that includes human remains and the kinds of “cultural items” covered by NAGPRA (if such items are “of archaeological interest” and at least 100 years of age). Although ARPA does treat human remains as “archaeological resources,” NAGPRA changed the implications of this term by establishing the right of custodial control in lineal descendants and culturally affiliated tribes.

ARPA imposes a permit requirement for the lawful excavation of such resources. If a permit might result in harm to or destruction of a site that an Indian tribe considers as holding religious and cultural importance, then the federal land manager must notify the tribe prior to the issuance of a permit. If items subject to such a permit are human remains or cultural items covered by NAGPRA, then the federal land manager must consult with tribes pursuant to the NAGPRA regulations.

E. Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §1531 *et seq.*, does not include specific statutory requirements to engage tribes in consultation. In recognition of the fact that actions taken by the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively the “Services”) under the ESA sometimes run into conflicts with tribal rights under treaties and statutes, or with federal obligations under

the trust responsibility to tribes, the Secretaries of Interior and Commerce have issued a joint Secretarial Order to establish policies and procedures to attempt to reconcile such conflicts. Secretarial Order # 3206, Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997).

This Secretarial Order includes statements of principles, one of which in particular is relevant to this Consultation Plan. Principle 5 states, “The Departments shall be sensitive to Indian culture, religion and spirituality.” The text following the statement of this principle says, in part:

“The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse impacts upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes.”

In the context of this Consultation Plan, tribal concerns regarding activities taken pursuant to the ESA overlap with tribal concerns about historic places (including traditional cultural properties) and other resources that are important for religious and/or cultural reasons. From the perspectives of the Tribes, the consultation requirements of the federal cultural resources statutes, especially the procedural requirements of NHPA consultation can be adequate, in some situations, to ensure that tribal concerns regarding the ESA, if federal agency ESA activities affect places that are recognized as eligible for the National Register of Historic Places.

In cases in which specific plant or animal species, or the places at which they are found, do not meet the criteria for consideration under the NHPA, many plants and animals, some of these plant or animal species may nevertheless be important to one or more of the Tribes for cultural and/or religious reasons. Under the Secretarial Order, particularly Principle 5, the FWS has a responsibility to consult with the Tribes regarding actions under ESA to determine the nature of tribal religious and/or cultural concerns and how to respond to such concerns.

In addition, for activities within Reservation boundaries, the Secretarial Order, in Principles 1 and 2, recognizes tribal authority over tribal lands and that Indian lands not federal public lands. Moreover, the text following Principle 1 explicitly states,

“Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials.” (Emphasis added.)

F. Tribal Laws

Tribal laws may impose requirements that go beyond consultation, including requirements for tribal consent or permission. This Consultation Plan does not attempt to offer a comprehensive discussion of applicable tribal laws, but rather provides only summary information. Through consultation pursuant to the protocols in part 8 of this Consultation Plan, NPS and each of the tribes whose reservations include land within the Grand Canyon will address the possibility of using stipulations in permits issued by NPS to ensure compliance with tribal laws.

(1) Hualapai Laws

The Hualapai Tribe has established a general permit requirement for any nonmember to be present within the part of the Hualapai Reservation that is not open to the public. All portions of the Reservation that can be accessed through the Colorado River are subject to this permit requirement.

With respect to cultural resources, a specific permit program has been authorized in the Hualapai Cultural Heritage Resources Ordinance (HCHRO), section 305. This permit program has not yet been implemented. Accordingly, permits for the excavation and removal of archaeological resources, and for human remains and cultural items covered by NAGPRA, are issued by the BIA, subject to tribal consent. The requirement for an ARPA permit does not apply to tribal employees engaged in properly authorized official business. 16 U.S.C. §470cc (g) (2); HCHRO §306.

(2) Navajo Laws

[**Note:** This section should be drafted by Navajo Nation representatives.]

(3) Havasupai Laws

[**Note:** Possible addition of a section on Havasupai laws. Although outside the River Corridor, the Havasupai Reservation is frequently accessed from the River, and the NPS permit system could be used to inform permit holders regarding tribal laws.]

8. PROTOCOLS FOR DIFFERENT TYPES OF CONSULTATION.

This Consultation Plan addresses consultation in three different contexts: (a) on-going consultative relationships among the tribal parties and federal agencies; (b) consultation that takes place within the framework of regularly-scheduled meetings as part of the AMP; and (c) consultation regarding specific actions that require compliance with federal statutes and regulations. The processes or mechanics of the three kinds differ and are described here. Protocols for the first two kinds of consultation are set out in this section; protocols for specific actions that require compliance with federal statutes and regulations are set out in Part 9.

The Colorado River corridor downstream of Glen Canyon Dam contains many places and resources that are important to one or more of the Tribes for a variety of reasons, including cultural, religious and/or historic reasons. Many of these places and resources are subject to the provisions of federal laws and regulations – NEPA, NHPA, NAGPRA and ARPA – that contain specific requirements for consultation with Indian tribes. The categories that are used to describe these places and resources often overlap, and some of these places and resources are subject to the provisions of two, three or all four of these statutes. Some of these places are also locations at which activities have been taken or are planned under the auspices of the AMP to carry out the policies of the Endangered Species Act (ESA).

The use of categories for the places and resources covered in this Consultation Plan is discussed further in Part 9, which sets out protocols for compliance with federal laws in specific contexts. Part 9 most likely does not anticipate all the specific issues that may arise. In the process of carrying out on-going consultation as provided in subsection 8.A and by using regularly scheduled meetings to accomplish some of the objectives of consultation, as provided in subsection 8.B, it may become apparent that there is a need to specify greater detail on certain aspects of consultation. If it proves necessary, this can be accomplished through the development of separate documents that may be adopted as addenda to this Consultation Plan. Conversely, consultation pursuant to subsections 8.A and 8.B may prove to be sufficiently effective that there is in fact no need for such an addendum specifying additional detail.

A. On-Going Consultation Relationships

In order to develop and maintain on-going consultative relationships, the federal agencies and the tribes agree to meet as follows:⁷

- (1) One meeting per year of all the federal agencies engaged in the AMP (BOR, NPS, FWS, BIA, USGS, GCMRC and WAPA) and all the tribes together will be held.
- (2) At least four separate meetings will be held of the tribes and GCMRC for the purposes of examining future research needs and methodologies and identifying potential areas of conflict between research activities and tribal values.
- (3) The tribes will have at least one meeting among themselves, for the purpose of preparing for the annual meeting with all the agencies and the meetings with GCMRC.
- (4) Each agency will have a separate meeting with each tribe at least once per year; at least once every two years, this meeting will take place at tribal offices. With the consent of the tribe, the annual meeting with an agency may include two or more of the federal agencies at the same meeting.

- (5) There will be at least one meeting per year of representatives of all of the entities that are parties to the PA.

All such meetings shall be in addition to all the regular meetings as part of the AMP, that is, in addition to AMWG and TWG meetings. The time and place for all such annual meetings shall be agreed upon and set at least thirty (30) days prior to the meeting. A tentative agenda will be circulated when the date and time is announced, with the understanding that all parties may suggest the addition of new items during any meeting. If any matter is on the agenda for which a federal agency decision is anticipated during the upcoming year, the agency will ensure that the official authorized to make the decision is in attendance. If a tribe is asking an agency to make certain commitments to the tribe, and the agency has the authority to make such commitments, the official with such authority will attend the meeting. Similarly, if an agency is asking a tribe to make a decision or take a position on an issue, the tribal official(s) with the appropriate authority will attend the meeting. If for any reason the appropriate agency or tribal official cannot attend the meeting, the agency or tribe will make best efforts to make alternative arrangements for a meeting between the appropriate officials.

B. Consultation in Regularly-Scheduled Meetings

The discussion of issues in regularly scheduled meetings of the AMP may constitute a step in the consultation process, but in and of itself, such a meeting is generally not sufficient for purposes of consultation. Representatives of the agencies and organizations engaged in the AMP should understand that meetings of the AMWG and TWG are alien environments for tribal representatives, in the way in which discussions are held and with respect to the attitudes conveyed regarding traditional tribal knowledge. In addition, tribal representatives sometimes find it hard to participate in AMWG and TWG meetings because of the behavior patterns of some non-Indian representatives, which tribal representatives regard as inappropriately assertive and aggressive, and sometimes confrontational. Accordingly, tribal representatives may need to engage federal agency representatives in consultative discussions both before and after AMWG and TWG meetings.

(1) Kinds of Meetings

(a) *Meetings of the AMWG.* Meetings are held biannually or more frequently as deemed appropriate by the designated federal official. In accordance with the Federal Advisory Committee Act (FACA), a written notice of each meeting of the AMWG is published in the *Federal Register* at least 15 days prior to the meeting, advising of the date, the place, and purpose of the meeting. In accordance with FACA, all meetings of the AMWG are open to the general public. Any organization, association, or individual may file a written statement, at the discretion of the AMWG, and provide oral input regarding topics on the meeting agenda, in accordance with FACA.

(b) Meetings of the TWG. Technical Work Group (TWG) meetings are held quarterly or more frequently as required. Where possible meetings are scheduled two to three months in advance. Information will be provided to all interested parties or members. Reclamation is responsible for submitting meeting notices to be published in the *Federal Register* 15 days prior to the meetings. The Chairperson, in consultation with the Vice-Chair and the GCMRC, of the TWG drafts a meeting agenda and a reminder notice to the TWG members and the staff and distributes it at least 10 days prior to the meeting. Sixteen TWG members must be present to constitute a quorum for voting purposes.

(c) Meetings of AMWG and TWG Ad Hoc Work Groups. Meetings are held as often as necessary to accomplish the task that has been assigned to them by the AMWG or TWG. (These ad hoc work groups can be comprised of official TWG or AMWG representatives with the additional inclusion of a technical individual who is not a representative of a TWG or AMWG party if necessary to improve the group's effectiveness). In general, any member may propose a meeting, just as any member may propose agenda items.

(d) Meetings of the PA Work Group. Meetings are held at least once a year as determined by the members of this group. In general, because this work group is specifically concerned with carrying out the PA on cultural resources, and because the members of this work group have expertise in this subject, meetings of this work group may very well contribute to consultation. Nevertheless, these meetings should not be considered to be sufficient for the purposes of consultation on any specific matter unless the concerned parties are in agreement that no further consultation is necessary.

(2) Generally Applicable Provisions for Meetings

(a) Meeting Agendas. Any stakeholder in the AMP, including the Tribes, may propose a meeting or suggest an agenda item for a meeting. Proposals for agenda item additions or meetings should be made to the Secretary's Designee in the case of AMWG meetings and the Chairperson in the case of the TWG. Proposed agenda item additions or meetings can also be made in care of the Bureau of Reclamation, Upper Colorado Regional Office. Agenda item addition requests should be made in writing, email, or by phone.

(b) Notification.

For AMWG and TWG meetings, notice of meetings is a formal requirement, as noted earlier. For other groups that are established either by AMWG or TWG, a concerned tribe should become a member of the group or otherwise make arrangements to ensure that it receives notice of meetings. In the event that any regularly scheduled meeting will include discussion of a compliance issue, the agency with lead responsibility for the compliance issue will ensure that concerned tribes receive notice that the issue will be on the agenda.

For meetings on the PA/HPP, notice will be provided by Reclamation after discussions with PA signatories to determine the necessity for a meeting and the agenda item(s) to be discussed.

(c) *Scheduling Conflicts.* The Parties understand that there may be individual tribal or federal activities that may make it difficult for the officially designated or alternative tribal or federal agency representative to attend a given meeting. All AMP stakeholders will attempt to avoid scheduling conflicts and to maximize tribal participation in all meetings of tribal interest. If the official tribal representative for a particular group is unable to attend, the Tribe may send an alternate.

9. PROTOCOLS FOR CONSULTATION FOR COMPLIANCE ON SPECIFIC ISSUES

As noted in section 8, the categories that are used to describe the kinds of places and resources that are the subject of this Consultation Plan often overlap. Accordingly, for purposes of the Protocols set out in this section of the Consultation Plan (herein the “Section 9 Protocols”), an explanation of the categories used is necessary.

A. Explanation of Categories of Places/Resources and Actions

Because the categories typically used to describe the places and resources that are the subject of this Consultation Plan overlap, and because these places and resources can be affected by a range of activities taken by or authorized by the parties to the AMP and/or PA, it is necessary to explain the categories used in this section of the Consultation Plan.

As noted in section 3.C of this Consultation Plan, the Final EIS used three basic categories to classify “cultural resources”: “archaeological sites,” “isolated occurrences,” and “Native American traditional cultural properties and resources.” The EIS includes some discussion of human remains and other “cultural items” covered by NAGPRA (“funerary objects,” “sacred objects,” and “objects of cultural patrimony”), and says, “Potential impacts to human remains and objects are addressed in the PA on Cultural Resources and the accompanying monitoring and remedial action plan.” Final EIS, p. 318. The PA on Cultural Resources, however, does not expressly address human remains and cultural items covered by NAGPRA.

The “Final Draft Information Needs” for the AMWG and TWG (Dec. 14, 2001) (*herein* “INs Document”) uses a somewhat different approach to classification. As discussed under Goal 11, “Preserve, protect, manage and treat cultural resources for the inspiration and benefit of past, present and future generations,” the INs Document uses two categories: “historic properties” and “traditionally important resources.” The term “historic properties” as used in the INs Document means properties that are eligible for the National Register and includes both archaeological sites and traditional cultural properties. The term “traditionally important resources” is used to describe resources

that are not “historic properties” (in the sense of being eligible for the National Register), but are nevertheless important resources to the tribes and therefore important resources for consideration under the AMP. The INs Document also uses the term “traditional cultural resources,” to include both of the categories “historic properties” and “traditionally important resources.” Like the Final EIS, the INs Document does not expressly address human remains and cultural items covered by NAGPRA, but rather focuses mainly on compliance with NHPA, NEPA, and ESA.

The INs Document identifies a number of information needs relating to these places and resources and the effects of dam operations and other activities on these places and resources. Some of the listed Information Needs are particularly relevant for the organization of this section of this Consultation Plan, including Research Information Needs 11.12c and 11.1.2d:

“Identify AMP activities that affect National Register eligible sites.”

“Identify NPS permitted activities that affect National Register eligible sites.”

One inference that can be drawn from these Information Needs is that neither NPS nor the other parties that are engaged in the AMP have a comprehensive understanding of the range of activities and natural processes that may affect historic properties in the River Corridor. Under Management Objective 11.2 – “Preserve resource integrity and cultural resource values of traditionally important resources within the Colorado River Ecosystem” – the INs Document lists five information needs, some of which raise rather sweeping implications about the need to know more about how AMP activities may affect these resources. Similarly, Effects Information Need 11.3. says, “Determine if and how experimental flows and other AMP actions restrict tribal access [to traditional cultural resources].” Moreover, Management Objective 11.3 says:

“Protect and maintain physical access to traditional cultural resources through meaningful consultation on AMP activities that might restrict or block physical access by Native American religious and traditional practitioners.”

This objective recognizes that consultation is essential for the other stakeholders in the AMP to understand how AMP activities may affect resources that are important to the Tribes for cultural and religious reasons.

In light of the breadth of the identified needs for information, both in terms of the nature of the places and resources of concern to the Tribes and the range of activities that may affect these places and resources, the basic approach taken in the Part 9 Protocols (consultation regarding compliance on specific issues) is as follows:

Places and Resources. The Part 9 Protocols use categories that correspond to the federal cultural resource laws. Using these categories, the Part 9 Protocols move from broad categories to more narrow ones. In one sense, the categories become narrower because the characteristics that define such places and resources operate to exclude places and resources that do not fit. In another sense, the categories

become narrower because the protective regimes established by the federal laws only apply if certain actions are taken. The order of used in this Part is not intended to convey a sense of hierarchy in that any given requirement is more important than another – rather, proceeding from general to specific simply seems more pragmatic. In general, the progression is:

- (1) NEPA (general environmental impact assessment);
- (2) NHPA (historic property) inquiry;
- (3) NAGPRA (human remains and/or “cultural items”) inquiry;
- (4) ARPA (archaeological resources) inquiry;
- (5) Executive Order 13007 (sacred sites) inquiry and American Indian Religious Freedom Act.

Actions. The Part 9 Protocols identify certain kinds of actions that are generally subject to consultation requirements. To ensure that activities that are not captured by inclusion in the list are in fact considered to determine if consultation is required and whether any specific legal requirements apply, these Protocols call for such determinations to be made through consultation.

Categories of actions are discussed first because the discussion of actions is considerably shorter than the section setting out protocols for specific kinds of places and resources.

B. Categories of Actions Subject to this Consultation Plan

A variety of activities taken by parties engaged in the AMP and by parties to the PA/HPP may result in affects on places and resources subject to this Consultation Plan. The kinds of activities that may affect these places and resources include: operations of Glen Canyon Dam; river trips by parties engaged in the AMP; activities for monitoring and restoration of endangered species; activities of private parties made possible by parties engaged in the AMP. For many of these activities, it is sometimes difficult to determine whether, or at what point, there is a Federal agency action that triggers the applicability of the requirements of the Federal cultural resources laws. Accordingly, this section seeks to make it easier to determine what Federal agency actions should trigger consultation.

(1) Kinds of Federal Actions that Trigger Consultation under These Protocols

(a) Any action for which the Federal agency determines that documentation must be prepared for purposes of compliance with the National Environmental Policy Act (NEPA) requires consultation under these Protocols, whether the level of documentation is an EIS or an EA. The extent to which consultation will be required for actions treated as categorical exclusions will be subject to discussions in meetings pursuant to the protocols in part 8.

(b) A federal action that is not specifically addressed in the HPP will be considered to be an “undertaking” – unless determined by the federal agency not to be an “undertaking” after consultation pursuant to Part 8 or 9.

(c) Actions taken as part of program for monitoring or restoration of endangered species require consultation under these Protocols, unless through consultation under subsection 9.B (2), a decision has been reached that consultation is unnecessary for the specific action or category of actions.

(d) Any other action that is funded, approved, or promoted by the AMP is considered to be a federal action (because any such action must be either approved, licensed, permitted or funded by a federal agency, e.g., BOR, GCMRC, NPS). This specifically includes research, monitoring and management actions carried out by GCMRC or funded by GCMRC.

(e) Any river trip, because any such trip requires permission from NPS.

(2) Consultation to Determine whether to Consult

In the context of consultation under Subsections 8.A and 8.B, Federal agencies and the Tribes will consider the full range of activities conducted under the auspices of the AMP and PA/HPP and determine appropriate points for consultation to take place.

C. Protocols for Categories of Places and Resources

The order of discussion in this section follows that set out in earlier in this part, with subheadings corresponding to each major category of consultation. Under these subheadings, the protocols are set out, designated with lower case letters. In order to reduce the potential for confusion in referring to these protocols, the system of designation is sequential – the designation runs from (a) through (h) without regard to the sub-headings, so that there is only one “protocol (a)” and so on. (For some of the protocols, though, there are several steps.)

(1) NEPA Consultation

Protocol (a) – NEPA documents. For any proposed federal action for which the responsible federal agency determines that a NEPA document will be prepared, whether the document is an EIS or an EA, the agency shall provide notice to each of the Tribes at least as early as the “purpose and need” phase of the preparation of the NEPA document. Upon request of a Tribe, the agency will consult with the Tribe regarding possible involvement in the preparation and/or review of the NEPA document.

(2) Historic Properties – NHPA Consultation

Protocol (b) – Actions that are specifically addressed in the Historic Preservation Plan (HPP). For any action that is specifically addressed in the HPP, compliance with the terms of the HPP will constitute consultation for purposes of this Consultation Plan.⁸

Protocol (c) – Actions that are not specifically addressed in the Historic Preservation Plan (HPP). For any proposed action that is not specifically addressed in the HPP, consultation with the Tribes shall include at least the following steps:

(c-1) Provide notice to the Tribes, with information. Notice to the tribes shall be provided to the contact person specified in Addendum ____, in the manner(s) so specified (e.g., email, fax, phone, and letter). To the extent practicable, notice shall also be provided to the Tribe’s representatives in the context of on-going consultation (Subsection 8.A consultation) and in regularly scheduled meetings of the AMWG, the TWG, and the PA work group (Subsection 8.B consultation). Notice to the Tribes shall include:

- a written description of the proposed action (including identification of the federal agencies and other entities involved in the action);
- the location of the proposed action (including a tentative delineation of the area of potential effects);
- a preliminary determination of whether the action would affect historic properties and, if so, the nature of likely effects on known properties; and
- the tentative dates on which the action is planned to occur.

To the extent practicable, the notice will be provided to the Tribes as least sixty (60) days prior to this tentative date. If the proposed action is subject to time constraints, the notice will explain these constraints and inform the Tribes that a response must be received by a certain date if the Tribe chooses to engage in consultation regarding the proposed action.⁹

(c-2) Tribal request for consultation. If a Tribe responds to the notice by requesting consultation, the responsible federal agency will engage in consultation with tribal representatives. Such consultation will include face-to-face meetings if the Tribe so requests, but may also include communication by phone, email and other means.

(c-3) Conduct consultation. If a tribe requests consultation the responsible federal agency will initiate the consultation process. The main objectives of this consultation will be to fulfill the requirements of the consultation process set out in the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. part 800, including identification and evaluation of historic properties, assessment of effects, and resolution of adverse effects. Because actions subject to this Consultation Plan take place in a context in which a substantial amount of historic preservation work has already occurred, it may be appropriate for some steps in the standard Section 106 process to be abbreviated. Whether or not any of the standard steps are abbreviated, this consultation shall include at least the following components:

- determine the federal agencies, tribes and other entities that should be invited to participate in the consultation;
- determine the extent to which existing information about historic properties (National Register listed or eligible) is adequate, including –
 - whether known historic properties are adequately documented or whether there are characteristics of a property that are not adequately documented for purposes of determining effects (e.g., a historic property that has been determined eligible as an archaeological site that is also a traditional cultural property but which has not been documented as such);
 - the likelihood that there are places that would be affected by the action that are eligible for the National Register but which have not been identified or evaluated (e.g., archaeological sites, TCPs).
- determine the likelihood that there are places or resources that are subject to NAGPRA or ARPA, or that are important to one or more of the Tribes for religious or cultural reasons, even though they may not be eligible for the National Register or there may not be enough information to make a determination of eligibility; and
- determine whether there are particular needs for confidentiality regarding the place or resources at issue.

(c-4) Consultation for undertakings affecting reservation lands or disputed status lands. For undertakings that affecting reservation lands of either of the tribes that has an approved THPO program, the THPO will perform the functions that would otherwise be performed by the SHPO. If the tribe has, with ACHP approval, established its own procedures in lieu of the ACHP regulations, such procedures shall be followed. For undertakings affecting places on lands for which the reservation status is subject to dispute, the THPO and SHPO will have equivalent status for purposes of the section 106 process.¹⁰

(c-5) Outcome of consultation. Consultation will seek to achieve consensus on how to proceed with respect to the affects of the proposed action on historic properties and/or other places or resources that are important to one or more Tribes for religious and/or cultural reasons.

- If consultation does result in consensus, that outcome shall be recorded in a Memorandum of Agreement (MOA). For any proposed action that may have effects on historic properties, for an MOA to be valid under this Consultation Plan it must be signed by responsible federal agency, any concerned Tribe(s), and the AZ SHPO or, if affects would occur within the boundaries of the Hualapai or Navajo Reservation, the appropriate THPO. For any proposed action with effects on lands for which the reservation status is subject to dispute, both the THPO and the SHPO will be required signatories for an MOA.

- If the proposed action would affect historic properties and it does not result in a consensus MOA, any Tribe that objects to the proposed action may request the ACHP to become engaged in the consultation.

(3) Cultural Items Protected by NAGPRA

Whether or not a place is eligible for the National Register, if there are Native American human remains or other “cultural items” (associated funerary objects, unassociated funerary objects, sacred objects, objects of cultural patrimony) located at the site, then NAGPRA applies. There are two contexts in which the graves protection provisions of NAGPRA can apply to actions subject to this Consultation Plan: (1) inadvertent discovery situations; and (2) intentional excavations.¹¹

Protocol (d) – Inadvertent discoveries.

(d-1) Notice of discovery. In any situation in which activities conducted under the auspices of the AMP or the PA and HPP result in the discovery of a place that appears to contain human remains and/or other cultural items, the person in charge of the activity will ensure that notice is provided as required by the statute. The notice shall be provided immediately by telephone and followed up with written confirmation. 43 C.F.R. §10.4(b).¹²

- Notice of any such discovery shall be provided to NPS.
- In all cases in which the NPS receives such notice, NPS shall notify all of the tribes that are likely to be culturally affiliated of the discovery.
- For any discovery that is within the boundaries of an Indian Reservation, notice shall also be provided to the relevant tribe.
- For any discovery that is within an area subject to disagreement over the location of a Reservation boundary, NPS shall notify the tribe that asserts that the location is within its Reservation and shall also notify the tribes that are likely to be culturally affiliated.
- Notice to tribes that are likely to be culturally affiliated will advise those tribes whether the location of the discovery is within a Reservation or within an area that a tribe asserts is within its Reservation.¹³

(d-2) Ceasing activity and protection measures. If the inadvertent discovery was caused by AMP or PA/HPP authorized activities (in the sense that the activities caused the partial disinterment of human remains or cultural items subject to NAGPRA, rather than in the sense that AMP or PA/HPP activities simply put people in a place to discover a disinterment caused by the actions of others or by natural causes or by operation of Glen Canyon Dam), then the official(s) in charge of the activity that resulted in the discovery will stop the activity in the area of the discovery. In any case, the person(s) in charge of the activities that led to the discovery will make a reasonable effort to protect the human remains and/or cultural items discovered.¹⁴

(d-3) NPS responsibilities for discoveries on federal lands. NPS will be responsible for ensuring that the requirements of the NAGPRA regulations are met, including:

- Certifying the receipt of notice;
- Taking immediate steps, if necessary, to further secure and protect the inadvertently discovered human remains and/or cultural items;
- Ensuring that all of the Tribes receive telephone notice of the discovery, with written confirmation;
- Inviting all of the Tribes to participate in consultation regarding the inadvertent discovery, pursuant to §10.5 of the NAGPRA regulations, and managing any such consultation that does take place;
- Ensuring that, if a decision is made that the human remains and/or cultural items must be excavated or removed, the requirements of §10.3(b) of the NAGPRA regulations will be followed (i.e. treatment as intentional excavation, addressed in Protocol (e), below; and
- Ensuring that, if the human remains and/or cultural items are excavated or otherwise removed, the disposition of these items will be carried out consistently with §10.6 of the NAGPRA regulations.

(d-4) Responsibilities of tribal officials for tribal lands. For any inadvertent discovery on tribal lands (i.e., lands within the boundaries of a Reservation), the tribal official designated in Addendum __ shall be responsible for ensuring that the requirements of the NAGPRA regulations are met, including:

- Certifying the receipt of notice;
- Taking immediate steps, if necessary, to further secure and protect the inadvertently discovered human remains and/or cultural items;
- Ensuring that, if a decision is made that the human remains and/or cultural items must be excavated or removed, the requirements of §10.3(b) of the NAGPRA regulations will be followed (i.e. treatment as intentional excavation, addressed in Protocol (e), below); and
- Ensuring that, if the human remains and/or cultural items are excavated or otherwise removed, the disposition of these items will be carried out consistently with §10.6 of the NAGPRA regulations.

(d-5) Discoveries on lands for which reservation status is subject to disagreement. Discoveries on such lands will be treated as federal lands for purposes of the responsibilities of NPS, until the point at which a decision is made on whether the human remains and/or cultural items must be excavated or removed. NPS will consult with the tribe that asserts that the land is within its reservation regarding immediate steps that may be necessary to further secure and protect the discovered human remains and/or cultural items, and the tribe may share the responsibility for taking such steps. In the event that NPS determines that the human remains and/or cultural items must be excavated or removed, or the tribe that asserts that the land is within its reservation makes such a determination, Protocol (e-4) will apply.

(d-6) Resumption of activity. If the inadvertent discovery was caused by AMP or PA/HPP authorized activities, the activity may resume thirty (30) days after the certification of the receipt of notice (by NPS or the tribal official), if the activity is otherwise lawful. With respect to NPS lands, the activity may also resume if NPS and the culturally affiliated Tribe(s) have executed a written, binding agreement that incorporates a NAGPRA Plan of Action for the excavation or removal of the human remains and/or cultural items, as authorized by §10.4(d)(2) of the NAGPRA regulations.

Protocol (e) – Intentional Excavations.

In any case in which the inadvertent discovery of human remains and/or cultural items leads to a decision that the human remains and/or cultural items must be removed from the ground, such removal shall be treated as an intentional excavation, subject to §10.3 of the NAGPRA regulations. Any other planned activity that may result in the excavation of human remains and/or cultural items from NPS lands is also subject to the intentional excavation provisions of the NAGPRA regulations.

(e-1) Applicability of ARPA permit regulations. NAGPRA requires the issuance of a permit pursuant to the Archaeological Resources Protection Act (ARPA) prior to the intentional excavation of any human remains and/or cultural items. NAGPRA requires that, prior to the issuance of an ARPA permit for federal lands, the federal agency must consult with concerned Indian tribes; with respect to tribal lands, consent of the governing tribe is required, and the Tribe itself is exempt from the permit requirement. With respect to federal lands, the ARPA regulations provide that “Persons carrying out official agency duties under the Federal land manager’s direction, associated with the management of archaeological resources” are not required to obtain a permit. 43 C.F.R. §7.5(c). (The Federal land manager, however, is nevertheless responsible for ensuring that the requirements of §§7.7, 7.8 and 7.9 of the ARPA regulations are met.) Accordingly:

- For any intentional excavation on NPS land, NPS will be responsible for ensuring that the applicable requirements of the ARPA regulations and the NAGPRA regulations will be met, even though an ARPA permit may not be required.
- For any intentional excavation on tribal lands, the BIA will be responsible for determining if an ARPA permit is required, the BIA will also be responsible for issuing any such permit; each Tribe will determine whether its laws require a tribal permit;

(e-2) Consultation for excavations on federal lands. Prior to the issuance of a permit for the excavation of human remains and/or cultural items subject to NAGPRA, NPS will be responsible for ensuring that consultation with the Tribes pursuant to §10.5 of the NAGPRA regulations. Any Tribe that is, or is likely to be, culturally affiliated with the human remains and/or cultural items at issue, has a right to be invited to

participate in this consultation. §10.5(a)(2). Accordingly, NPS will routinely invite all of the Tribes to participate in any such consultation, leaving the decision to each Tribe whether or not it chooses to participate. Consultation is concluded with a “written plan of action” which includes the items listed in §10.5(e). A written plan of action for intentional excavation must include a determination of cultural affiliation, and consequently, which Tribe has the right to custodial control of the human remains and/or cultural items, pursuant to §10.6.¹⁵ (In the event that the tribes and NPS enter into a comprehensive agreement pursuant to §10.5(f), the terms of such an comprehensive agreement may supersede these protocols.)

Since compliance with NAGPRA does not relieve the federal agency of its responsibilities for compliance with NHPA section 106, consultation with the Tribes for purposes of NAGPRA compliance will include a review of information relevant to compliance with NHPA and a determination, by the federal official, of whether the activity requires further action for compliance with NHPA (which will generally be conducted in accordance with Protocol (b) or (c)).

(e-3) Consent for excavations on tribal lands. For any excavation on tribal lands (i.e., within the boundaries of any Reservation), consent of the governing Tribe is required. In any such case, the governing Tribe will determine which tribal laws apply and what the requirements of those tribal laws are. The BIA will determine if an ARPA permit is required, and, if so, will be the permit-issuing agency.

(e-4) Excavations on lands for which reservation status is subject to disagreement. In the event that an intentional excavation is planned for land subject to disagreement regarding its status as within an Indian reservation (generally circumstances described in protocol (d-5), NPS and the tribe will consult on whether it is necessary or advisable to reach a definitive resolution of the underlying boundary issue prior to excavation or removal. NPS will also consult with the other tribes that are likely to be culturally affiliated or that have a demonstrated cultural relationship with the human remains and/or cultural items. If an agreement on how to proceed is reached among NPS and all the consulting tribes, that agreement will govern the particular excavation or removal; such an agreement may specifically provide that it does not resolve the underlying boundary issue. If the tribe that asserts reservation status determines that the underlying boundary issue must be resolved, the excavation or removal will not take place until the tribe has had a reasonable opportunity to seek resolution of the issue by a tribunal with jurisdiction.

(e-5) Disposition of human remains and/or cultural items from Federal lands. For any human remains and/or cultural items that are excavated or removed from NPS lands, NPS will be responsible for ensuring that the ultimate disposition is consistent with NAGPRA and its implementing regulations. For any such items that NPS determines shall be removed from the earth, assuming that a determination of cultural affiliation has been made prior to removal, NPS may allow the removal to be carried out under the authority of the culturally affiliated Tribe according to religiously or culturally prescribed means rather than through archaeological excavation.

(e-6) Disposition of human remains and/or cultural items from tribal lands.

For any human remains and/or cultural items that are excavated or removed from tribal lands, NAGPRA provides that the right of custodial control is vested in the governing tribe (unless there are known lineal descendants). In any such case, a Tribe that asserts a claim of cultural affiliation with the human remains and/or cultural items may ask the governing Tribe to release the human remains and/or cultural items to its custody. How to respond to any such request is strictly a matter for the governing Tribe to decide.

(4) Sites Protected by ARPA – Archaeological Resources

ARPA applies to “archaeological resources,” which is defined to mean “any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.” 16 U.S.C. §470bb(1); 43 C.F.R. §7.3(a). The term “archaeological resources” includes human remains and cultural items protected by NAGPRA, provided that such items are more than 100 years of age and possess archaeological interest. (Moreover, since an ARPA permit is required for the excavation or removal of human remains and/or cultural items covered by NAGPRA, the 100 years of age and archaeological interest factors are not really relevant.) There are, however, many kinds of archaeological resources that are not covered by NAGPRA.

Protocol (f) – Archaeological resources on Federal lands

NPS is responsible for ensuring that any excavation or other removal of archaeological resources from NPS lands is conducted in accordance with ARPA and its implementing regulations. Since it is often difficult to determine if human remains and/or cultural items covered by NAGPRA are present at a site prior to excavation, NPS will proceed on the assumption that such NAGPRA-protected resources are likely to be present. Accordingly, all planned ground disturbing activities will require a NAGPRA plan of action.

Protocol (g) – Archaeological resources on tribal lands.

BIA is responsible for determining if ARPA applies to the excavation or removal of archaeological resources for land within the boundaries of the Hualapai or Navajo Reservation. BIA is similarly responsible for issuing any ARPA permit that is required, and for ensuring compliance with the requirements of ARPA and its implementing regulations. An ARPA permit requires the consent of the Tribe with jurisdiction over the reservation. As noted in section F of Part 7 of this Consultation Plan, tribal laws regulate the excavation of archaeological resources within the Hualapai and Navajo Reservations. In any case in which the BIA is considering the issuance of an ARPA permit, in the context of that permit process the relevant Tribe will have an opportunity to determine whether tribal laws apply to any such excavation or removal.

(5) Sacred Sites subject to AIRFA and Executive Order 13007

Protocol (h) – Indian sacred sites.

AIRFA establishes federal policy of protecting the right of Indian people to conduct traditional religious practices at sites that hold religious importance, a policy that is reinforced by Executive Order 13007 with respect to Indian sacred sites on federal lands. If any proposed action or on-going activity may result in adverse impacts on an Indian sacred site, as defined in Executive Order No. 13007, the concerned Tribe(s) and federal agency(ies) may initiate (or continue) consultation pursuant to the NHPA consultation provisions of these Protocols (Protocols (b) and (c)). In the alternative, the Tribes and federal agency(ies) may engage in consultation to accommodate tribal access to and use of the sacred site without exploring issues relating to whether the site is eligible for the National Register. It may be possible for adequate accommodation to be realized without engaging in NHPA consultation. This does not relieve the Federal agency of its responsibilities under NHPA; rather, sacred sites consultation under this subsection should inform the Federal agency's conduct in carrying out NHPA consultation. (For example, a sacred site may be potentially eligible for the National Register as a TCP, but if adequate accommodation can be realized without using the NHPA process, the concerned Tribe may decide not to provide the information that would be needed for evaluating National Register eligibility.)

10. CONFIDENTIALITY

The Parties recognize that inherent contradictions may arise between mandates for dissemination of information into the public domain and tribal traditions or restrictions on dissemination and control of knowledge or information. With respect to information relating to the location or character of a traditional cultural property, the agencies are authorized under section 9 of the Archaeological Resources Protection Act, 16 U.S.C. §470hh, and under section 304 of the National Historic Preservation Act, 16 U.S.C. 470w-3, to withhold information from disclosure in certain circumstances. The Tribes recognize, however, that these statutory provisions are less than completely satisfactory for preserving the confidentiality of information that the Tribes regard as sensitive. The Tribes and Federal agencies will consult regarding ways to preserve the confidentiality of sensitive information.

Accordingly, the Tribes will generally confine their discussions of sensitive matters to consultation meetings with Federal agency representatives. Federal agency representatives will assist tribal representatives in limiting the scope of information revealed so that the objectives of the federal statutes can be fulfilled without need for specific information about religious practices; Tribes will generally not reveal more information about religious practices than is necessary to determine the *historic* significance of places and to assess the nature of effects on such places.

In the context of meetings of the AMWG, TWG and other AMP groups, the Tribes are asked only to provide information to the Agencies or other AMP stakeholders when that information is not privileged or restricted and subject to the agencies need to

know to make informed decisions. The Tribes understand that information provided in such AMP meetings will be treated by other stakeholders as unrestricted. Conversely, the Agencies are asked to disseminate information or knowledge to the Tribes and the general public in compliance with the Government in the Sunshine Act, the Federal Acquisition Regulation, and the Presidential Memorandum on Openness and Confidentiality (Oct. 14, 1993).

11. FUNDING OF TRIBAL PARTICIPATION AND CONSULTATION

Tribes are funded under separate cooperative agreements with the agencies to ensure government-to-government consultation occurs. Accordingly, issues relating to funding are not addressed in this Consultation Plan. Parties engaged in the AMP and parties to the PA/HPP should be aware that the funding needs of the Tribes are not static – funding that may have been adequate in the early years of the AMP may no longer be sufficient. In the Strategic Plan for the Adaptive Management Program (Final Draft, August 17, 2001), the AMWG FACA Committee Guidance (Appendix B), says: “Certainly the direct impacts of the dam operations on the Native American trust resources within the park units can and should be funded from hydropower revenues, but such impacts outside the boundaries of the river corridor in the park units must be studied using other appropriated funds.”

12. MEASURING AND TRACKING CONSULTATION

In the experience of tribal representatives, Federal agencies seem to have impressions about the effectiveness of consultation that differ from the impressions of the Tribes. Accordingly, it is important to establish a mechanism to evaluate the effectiveness of consultation from both sides. As an initial approach, each of the Federal agencies and each of the Tribes will keep track of the number of consultations that occur in each fiscal year, categorized in accordance with Parts 8 and 9 of this Consultation Plan. For each matter that is the subject of consultation, each Federal agency and each Tribe will record the number of times that consultation events occurred regarding that matter (whether face-to-face, by phone, or by other correspondence) and the dates on which such consultation events occurred. Not every contact need be recorded as consultation; if it is not clear from the circumstances, the parties should reach an understanding of whether the contact is part of consultation on a particular matter. For each such matter that is treated as consultation, each Federal agency and each Tribe will indicate whether the consultation resulted in a satisfactory outcome using a four-point scale (satisfactory, somewhat satisfactory, somewhat unsatisfactory, and unsatisfactory). This evaluation should focus on the satisfactoriness of the process, rather than the outcome, but the parties may also choose to record comments regarding outcomes. Narrative reports of consultation matters may also be offered.

Within sixty (60) days of the end of each fiscal year, the Tribes and Federal agencies will exchange reports. These reports shall be discussed in consultation meetings pursuant to Section 8.A and 8.B.¹⁶

13. DISPUTE RESOLUTION

Should any Tribe or agency (or, with respect to the AMP, other stakeholder) object in writing to any of the other parties regarding any action carried out or proposed with respect to the AMP or the PA/HPP, the parties shall consult to try to resolve the objection.

A. AMP Activities

If after initiating such consultation the parties determine that the objection cannot be resolved through consultation, then the objecting party shall forward all documentation relevant to the objection to the Secretary's Designee or the Secretary of the Interior, including their proposed response to the objection. Within 30 days after receipt of all pertinent documentation, the Secretary's Designee or Secretary shall exercise one of the following options:

- (1) Advise the objecting party the Secretary (or Secretary's designee) concurs in the proposed response to the objection, whereupon the relevant parties will respond to the objection accordingly;
- (2) Provide the parties with recommendations which they shall take into account in reaching a final decision regarding response to the objection; or
- (3) Bring in a mediator or professional skilled in alternative dispute resolution to assist with resolving the objection, issue or dispute.

Recognizing that the primary role of the AMWG is to provide recommendations to the Secretary's designee, if Tribe objects to a proposed recommendation to the Secretary's designee, and the AMWG decides to present the recommendation to the Secretary's designee in spite of the Tribe's objection, the Tribe has the option of submitting a minority opinion report to accompany the recommendation to the Secretary's designee. In such a case, other parties in the AMWG, including other Tribes, have the option to join in such a minority report. Alternatively, objecting parties can express their objections in a meeting so that their objections are recorded in the minutes, and they can abstain from voting.

B. PA and HPP Disputes

In the event that a dispute arises in the context of the PA or HPP, any such dispute may be resolved in accordance with the dispute resolution clause of the PA or HPP, if

applicable. In addition, since activities conducted in the context of the PA or HPP take place within the framework of otherwise applicable federal regulations, other administrative processes may be available. One way to resolve a dispute arising in the context of the PA is to dissolve the PA and return to following the ACHP regulations (36 C.F.R. part 800).

C. Availability of Other Administrative Appeal Processes

The responsible federal official shall inform a Tribe filing a written objection if any administrative appeal process is available for resolution of the dispute. In the context of the AMP, the Secretary's designee will be responsible for providing this information to the Tribe. In the context of PA or HPP activities, the Federal agency responsible for the proposed action that is the subject of the dispute will so advise the Tribe.

¹ This addendum has not yet been drafted. It will be a short list of references, including citations to some of the documents on the Office of American Indian Trust web site. A written list as an addendum to this Consultation Plan is considered advisable, in part because web sites change.

² Executive Order 13175 has been endorsed by the Bush Administration. A letter from Alberto Gonzales, Counsel to the President, to Congressman Frank Pallone (D-NJ) (June 19, 2002), to this effect was published in *Indian Country Today*. To my knowledge, the Administration has not issued a formal document to this effect.

³ Much of the language in Part 4 is adapted from a document published by the National Environmental Justice Advisory Council (NEJAC), entitled GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING (Nov. 2000), (hereinafter *NEJAC Guide*) available for download on the website of the EPA Office of Environmental Justice, at www.epa.gov/compliance/environmentaljustice/index.html. (Click on NEJAC, then Subcommittees, then Indigenous Peoples.) The final sentence (calling for telling a tribe if its recommendations have not be accepted) is adapted from the BIA "Government-to-Government Consultation Policy (Dec. 13, 2000), adopted pursuant to Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000). This final sentence states a point that was raised by several tribal representatives in the meetings we have had working on this Consultation Plan.

The main reason for drawing on the *NEJAC Guide* rather than the BIA policy is that the focus of the BIA policy is generally not appropriate for this Consultation Plan, in that the BIA Policy is designed to facilitate consultation with tribes on major policy issues, issues that may be addressed through rule-making and/or legislation. In the context of this Consultation Plan, we are more concerned with ensuring that federal agencies act in accordance with existing laws and regulations.

⁴ The draft language assumes that an HPP has been developed, although that is not the case as of the date of this draft. This Consultation Plan is intended to become a chapter in the HPP. Some revisions in the wording of this paragraph may become necessary for consistency with the format

HPP when it is developed. In addition, if other parties become signatories to a revised PA, it may be appropriate to include references to such agencies and their roles at this point. Agencies that may become signatories to a revised PA include BIA, Western Area Power Administration, and Lake Mead National Recreation Area.

⁵ The statements of principles in this part are based mostly on the *NEJAC Guide* (the “Guiding Principles” of consultation). The second principle was added in response to the discussion in the August 7-8, 2002, meeting. Although this overlaps somewhat with the principle about establishing training programs, it is sufficiently different to be stated separately.

⁶ This addendum has not yet been written. Tribal representatives generally think that the information provided in this addendum can be limited to: the name, institutional affiliation, and contact information for an individual and an alternate to serve as the primary contact for each tribe for purposes of this Consultation Plan; plus the name, title, and contact information for the official of each Tribe who serves as the head of the Executive Branch of the Tribe’s government (or who performs such functions if the Tribe does not operate with a separation of executive and legislative powers).

There has been some discussion in the meetings of tribal representatives about the option of providing more information on each tribe, perhaps information on the tribe’s land base, population, form of government, and whatever else the tribe wants included, such as a general statement about the importance of Grand Canyon to the tribe. The final EIS, at pp. 141 – 146, provides summaries of the importance of the Grand Canyon to the tribes (treating the Southern Paiutes as a single tribe). Another option would be to provide citations to published reference works.

⁷ The frequency of meetings set out in this section is based on the views of tribal representatives, reflecting their judgment of how to make consultation effective without becoming too burdensome. The frequency of meetings is not mandated by law or regulations. By establishing effective on-going relationships, however, the necessity for meetings to deal with specific compliance requirements (i.e., the Part 9 protocols) may be reduced.

The representative of the Bureau of Reclamation has expressed willingness to accept the arrangements set out in this section, noting, of course, that she does not speak for the other agencies.

⁸ It is intended that this Consultation Plan will be adopted as a chapter in the HPP. Other chapters of the HPP (particularly the chapter dealing with treatment and monitoring of known sites and resources) will include provisions that will alleviate the need to follow the steps set out in this section. As the other parts of the HPP are developed, some revisions in wording may become necessary at this point in the Consultation Plan.

⁹ Time frames will vary depending on the nature of the proposed action. If consultation has been effective under Part 8, and if the HPP is in fact developed and implemented, the number of proposed actions subject to this protocol may be relatively small. In any case, federal agencies should be aware that, if the proposed action would adversely affect one or more historic properties, 60 days is not likely to be sufficient to resolve the adverse effects; if there are no adverse effects, however, it may be long enough to conclude the section 106 process.

¹⁰ Under the ACHP regulations, if the undertaking would affect reservation lands, the THPO is

the required party and the federal agency decides, in consultation with the THPO, which other parties should be included. §800.3(f)(3); see also §800.2(c)(A). If the undertaking only affects places outside reservation boundaries, each Tribe has a right to be a consulting party (which the Federal agency cannot deny), §800.3(f)(2); each Tribe may be an invited signatory to an MOA, with the same rights as the required signatories, but the decision whether to invite such a Tribe is up to the Federal agency official, §800.6(c)(2).

The language in protocol (c-4) and corresponding language in (c-5) call for the THPO and SHPO to have essentially the same role in the process for lands for which the reservation status is subject to dispute.

¹¹ This subsection of the Protocols seeks to conform to the requirements of the statute and the regulation issued by the National Park Service. 43 C.F.R. part 10.

¹² Notice by phone is required by the regulations. This means that every authorized AMP or PA/HPP group in the River Corridor will need a radio phone, and the group leader must know of the requirement to use it in the event of an inadvertent discovery.

¹³ This is a point at which it will likely be more expeditious to rely on NPS to provide notice to the tribes rather than have the leader of the group making the discovery be responsible for determine where the discovery is with respect to disputed boundary lines. If the discovery is, in fact, within the boundaries of a Reservation, the tribe on whose reservation the site is located is not obligated to provide notice to other tribes. Rather, NAGPRA provides that, for human remains and cultural items found on “tribal lands,” the tribe has rights of ownership or control (unless, with respect to human remains and associated funerary objects, there are known lineal descendants). 25 U.S.C. §3002(a)(2)(A). Since the tribe on whose tribal lands the discovery is made has the right to take custody, such a tribe also has the discretion to transfer custody to a different tribe in the event that the latter tribe is culturally affiliated with the items and the tribe within whose reservation the discovery was made is not culturally affiliated. This is entirely within the discretion of the tribe on whose tribal lands the discovery was made, and the tribe is under no legal obligation to give notice to any tribe(s) that may be culturally affiliated. Under the language in protocol (d-1), NPS will assume the burden of providing notice to potentially culturally affiliated tribes. If the discovery is undisputedly within a reservation, a tribe with a claim of cultural affiliation can ask the tribe on whose reservation the discovery is made to exercise discretion and allow the tribe making the claim to take custody.

In the event that human remains are discovered in a place with respect to which there is a disagreement on whether it is reservation land or NPS land, a tribe with a claim of cultural affiliation (i.e., other than the tribe whose reservation boundary is at issue) may have a legal right to take custody if the land is determined to be federal land. (Whether such a claim amounts to a legal right would, of course, depend on NPS determining that such a tribe’s claim of cultural affiliation is stronger than any other tribe’s claim.) In such a case, the tribes may be able to resolve the disposition of the items covered by NAGPRA without resolving the underlying issue of the reservation boundary, or they may determine that the boundary issue must be resolved before the NAGPRA issue can be resolved. Protocol (d-1) acknowledges the possibility of such a case arising and ensures notice to tribes with a stake in the outcome. It does not attempt to resolve the underlying boundary issue.

¹⁴ This language is adapted from the regulations. 43 C.F.R. §10.4(c). In meetings of tribal representatives, there has been some discussion of the possibility of providing some guidance on

what steps would be considered “a reasonable effort” to protect the discovered items, but at this point no such guidance is provided.

¹⁵ The NAGPRA regulations require a determination of cultural affiliation as part of the plan of action that concludes consultation. 10.4(c)(2) (intentional excavations); 10.5(e)(2) (inadvertent discoveries). NAGPRA requires that consultation with tribes take place prior to excavation of human remains and/or cultural items on federal lands, 25 U.S.C. §3002(c)(2), a requirement incorporated into the regulations at 43 C.F.R. §10.3(b)(4). (This requirement applies whether the excavation/removal begins as an intentional project or an inadvertent discovery, because, in the case of an inadvertent discovery, if the decision is made by the federal official that the human remains and/or cultural items will be excavated or removed, the requirements for intentional excavations apply. 43 C.F.R. §10.4(d)(1)(v).) In addition to this legal requirement, it is important to determine cultural affiliation prior to excavation/removal so that the religious and cultural practices of the culturally affiliated tribe can be accommodated during excavation/removal. Notwithstanding the legal requirements, in some instances, a definitive determination of cultural affiliation may not be possible prior to excavation; similarly, excavation/removal may yield information that indicates that a determination of cultural affiliation made prior to excavation/removal may have been incorrect. This protocol does not propose a solution for such a situation. This issue may be subject to consultation under the protocols in part 8.

¹⁶ The parties recognize the need to establish a process for measuring and tracking consultation, but they do not intend for the process to be unduly burdensome. The process is likely to change with experience.